STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	:	
	:	**ICC Docket No. 11-0710**
In re Proposed Contracts Between Chicago Clean Energy, LLC and Ameren Illinois Company and Between Chicago Clean Energy, LLC and Northern Illinois Gas Company for the Purchase and Sale of Substitute Natural Gas Under the Provisions of Illinois Public Act 97-0096	:	

VERIFIED COMMENTS ON REHEARING OF CHICAGO CLEAN ENERGY, LLC

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Chicago Clean Energy, LLC ("Chicago Clean Energy" or "CCE"), by and through its attorneys, DLA Piper LLP (US), pursuant to schedule set forth by the Chief Administrative Law Judge ("Chief ALJ") of the Illinois Commerce Commission ("Commission"), respectfully submits its Verified Comments on Rehearing. In conjunction with these Verified Comments, attached hereto and made a part hereof as Attachment A is the "CCE Corrected Agreement," the form of sourcing agreement which Chicago Clean Energy respectfully requests that the Commission approve as the sourcing agreement that CCE will enter into with Northern Illinois Gas Company ("Nicor") and Ameren Illinois Company ("Ameren") (the "Sourcing Agreement").

As the Commission is aware, the result in this docket will directly dictate whether a multi-billion dollar clean coal to substitute natural gas ("SNG") project that enjoys the strong support of the General Assembly and the Governor is developed on Chicago's South Side or dies as unfinanceable under the terms of the Commission's January 10, 2012 Order (the "January 10 Order"). For the reasons set forth herein, Chicago Clean Energy respectfully requests that the Commission substantially revise the January 10 Order in order to allow the project to advance.

I.

INTRODUCTION

THE COMMISSION SHOULD REVISE THE JANUARY 10 ORDER TO RESTORE THE VIABILITY OF THE CHICAGO CLEAN ENERGY PROJECT

The Chicago Clean Energy project is at a crossroad, and the Commission holds the future of the project in its hands. The project's benefits -- which neither the Commission Staff nor any other party has challenged --have been clearly articulated. The Commission now must decide whether it wants to advance the project to realize those benefits or take it down the path that abruptly would bring the project to a halt.

Down one path, the Chicago Clean Energy project will progress toward realizing the undisputed benefits of several hundred jobs, substantial economic growth and tax revenue, redevelopment of a 140-acre urban brownfield site, development of carbon capture and sequestration technology, and production of domestic clean energy using Illinois coal and petroleum coke ("petcoke"). To move forward along this path, the Commission would undertake the limited but important tasks delineated in the General Assembly's specific statutory directions. This path, advocated by both CCE and the Economic Development Intervenors ("EDI") -- a diverse group of stakeholders -- requires that the Commission retrace its steps, and revisit the scope of the legal authority that it has been given by the General Assembly to modify the final draft sourcing agreement transmitted from the Illinois Power Agency ("IPA") to the Commission on October 11, 2012 (the "IPA-approved final draft sourcing agreement") and take precisely the steps that have been outlined in the statute and reiterated in the Senate and House Resolutions: "the Illinois Commerce Commission, in reviewing and approving sourcing agreements, was only to: (1) fill in the blanks in the final draft sourcing agreement based upon the previously established capital costs, operations and maintenance costs, and the rate of return

for the Chicago Clean Energy project; (2) remove 2 statutorily unauthorized early termination provisions from the final draft sourcing agreement; and (3) correct typographical and scrivener's errors . . .." (SR 585; HR 755.) To advance along this first path, the Commission would **reject *all other* proposed modifications** to the IPA-approved final draft sourcing agreement and additional conditions to be placed upon Chicago Clean Energy.

The alternative path, advocated by the utilities, would result in the termination of the Chicago Clean Energy project. To move down this path, on rehearing, the Commission would act in a manner that is plainly contrary to the language of the statute, as subsequently clarified by both the Senate and the House as well as the sponsors of the enabling legislation. The Commission not only would embrace the position in the January 10 Order that it had the authority to modify the IPA-approved final draft sourcing agreement, it would make further modifications that negatively impact the economics of the project, undermining the prior findings of the IPA, the Capital Development Board ("CDB"), and the Commission itself.

The instant Verified Comments provide the roadmap for the Commission to enable the Chicago Clean Energy project to proceed. As explained herein, in the Order on Rehearing, the January 10 Order should be revised in four (4) specific ways:

- **First, the Commission should modify the terms in IPA-approved final draft sourcing agreement *only in the limited manner specified by the statute.*** The January 10 Order took steps that far exceed what is allowed under the explicit statutory structure. The Commission lacks the authority to act in ways that are not specifically authorized by statute. In particular:

  A. The Commission should reject the modification that would reduce the amount of SNG required to be purchased under the Sourcing Agreement. The January 10 Order improperly reduced the anticipated annual output of the facility and thus potentially the annual contract quantity that the utilities would purchase.

  B. The Commission should reject the modification that would reduce the percentage of costs recoverable under the Sourcing Agreement. The IPA-approved final draft sourcing agreement required Nicor and Ameren customers to

pay 95.45% of the costs, in recognition of other benefits those customers will receive (guaranteed savings, revenue sharing, etc.). Even though the IPA had decided this issue, the January 10 Order accepted Nicor's argument that the utilities should only pay 84% of costs.

- **Second, the Commission should remove the unauthorized obligations that were added to the IPA-approved final draft sourcing agreement.** The January 10 Order added new terms to the Sourcing Agreement that were never contemplated in the legislation or the IPA-approved final draft sourcing agreement, incorporating a payment guarantee that is to be negotiated with the utilities and submitted separately to the Commission for its approval, as well as obligations related to a capital structure report and carbon sequestration. These provisions were not addressed in the IPA mediation of the sourcing agreements, were never accounted for in the project economics, and are barriers to the project advancing.

- **Third, the Commission should remove the additional early termination provisions from the IPA-approved final draft sourcing agreement.** The statute requires the Commission to remove certain termination provisions. CCE requested that the Commission remove Section 1.2(h) from the IPA-approved final draft sourcing agreement because it explicitly would allow the utilities to terminate the sourcing agreement if the utilities were not allowed to fully recover their costs associated with the sourcing agreement. CCE also requested that Section 14.20 (non-severability provision) be removed in light of (1) the specific requirement of (h-4) directing the Commission to limit the circumstances under which the Sourcing Agreement could be terminated, and (2) the utilities' articulated position that they would intend to use this provision as a means to terminate the Sourcing Agreement if the utilities were ever denied full cost recovery.

- **Finally, the Commission should correct the typographical and scrivener's errors in the IPA-approved final draft sourcing agreement.** The January 10 Order erred by rejecting several scrivener's and typographical errors presented by CCE that were agreed to by Staff. These revisions, as reflected in the form of the CCE Corrected Agreement attached hereto as Attachment A, will clarify the terms under which CCE and the utilities will be able to operate.

As the Commission is aware, the Chicago Clean Energy project will bring massive benefits to the State and its citizens:

- $3 billion of new investment in the State;

- Over $1 billion in new State and local tax revenue;

- Over $10 billion added to the State's economic output;

- During construction, 1,100 full-time construction workers and more than 600 additional workers in supporting industries;

- During operations, 200 full-time workers and nearly 500 additional jobs in local and supporting industries;
- Remediation and re-use of a long-fallow 140-acre urban industrial brownfield;
- Commercialization of a clean energy technology for processing Illinois coal;
- Large-scale commercial implementation of carbon capture and sequestration; and
- $100 million in guaranteed consumer savings

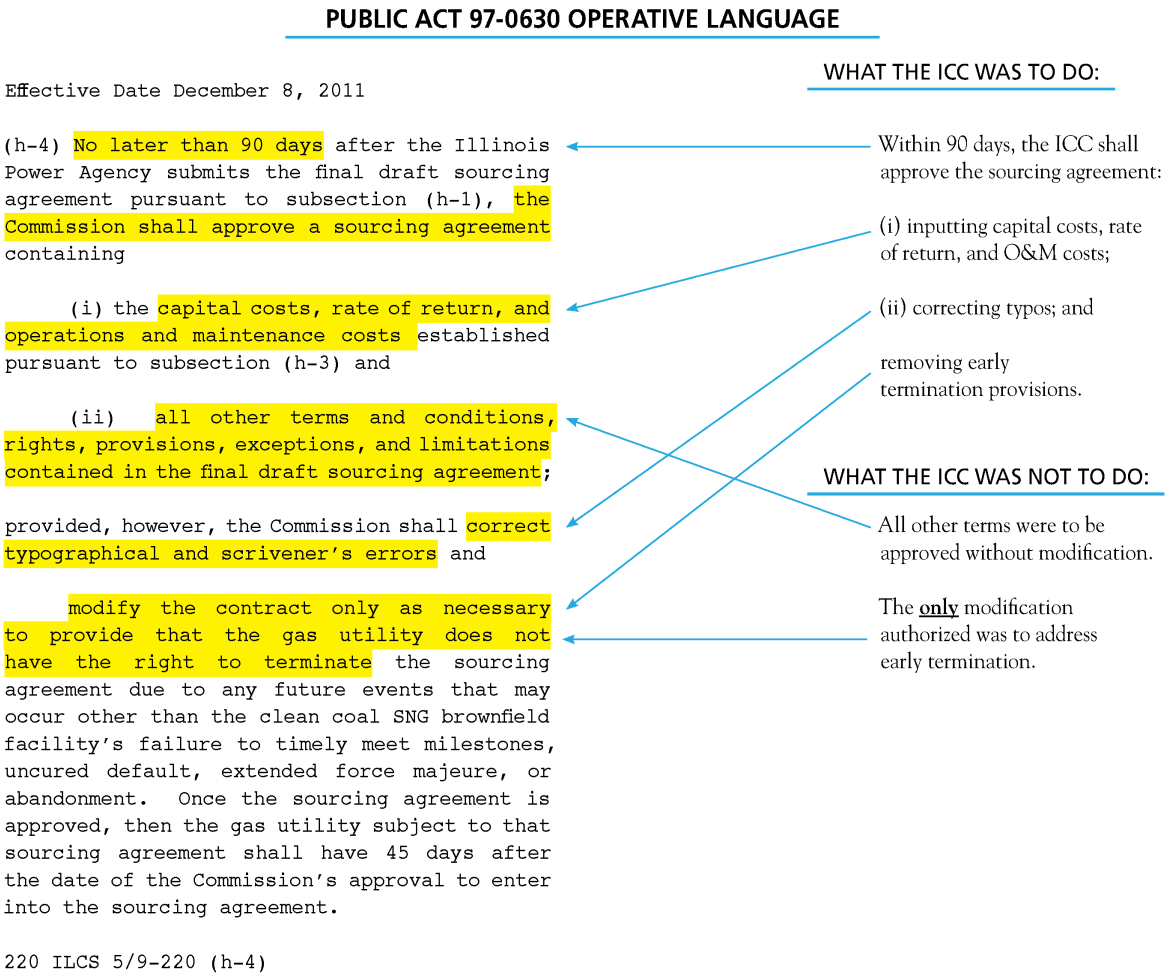
These benefits are discussed in more detail at the Chicago Clean Energy web site, http://www.chicagocleanenergy.com/. CCE respectfully requests that the Commission enter an Order on Rehearing acknowledging the Commission's role under the statute, making only those revisions that were explicitly authorized by the General Assembly, and permitting the project to continue to advance.

II.

THE COMMISSION SHOULD MODIFY THE JANUARY 10 ORDER TO CONFORM TO THE APPLICABLE STATUTE AND TO PERMIT THE PROJECT TO ADVANCE

The General Assembly set forth a comprehensive statutory framework that gives the Commission a critical but narrowly-defined role in developing the Sourcing Agreement. (*See* 220 ILCS 5/9-220(h-3), (h-4); CCE Brief on Exceptions at 7-17; CCE Reply Brief on Exceptions at 4-7.) Respectfully, the January 10 Order failed to conform to those limitations and directed revisions be made to the IPA-approved final draft sourcing agreement that plainly exceeded the Commission's statutory authority.

The plain terms of the Act provide that to the extent there were ***any*** prior determinations made by the IPA (other than with regard to the early termination provisions), the Commission was not to modify those terms except as to correct typographical and scrivener's errors:



Thus, the General Assembly explicitly constrained the Commission's authority by requiring that the Commission approve "***all other terms and conditions***, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4) (emphasis added).)

At the Commission's January 10, 2012 open meeting, the Chairman suggested that it might be appropriate for the General Assembly to provide further guidance regarding the Commission's role. (*See* January 10, 2012 Tr. at 129:8-9.) On February 8, 2012, the Illinois

House of Representatives adopted House Resolution 755, confirming the Commission's limited role in developing the Sourcing Agreement. On February 24, 2012, the Illinois Senate adopted Senate Resolution 585 (Trotter-Cullerton), which is identical in substance to HR 755 (Colvin-Madigan) (collectively, the "Resolutions"). The Resolutions provide clear guidance to the Commission regarding its statutory charge. With regard to the Commission's authority, the Resolutions state:

> WHEREAS, Pursuant to Public Act 97-630, the Illinois Commerce Commission, in reviewing and approving sourcing agreements, was only to: (1) fill in the blanks in the final draft sourcing agreement based upon the previously established capital costs, operations and maintenance costs, and the rate of return for the Chicago Clean Energy project; (2) remove 2 statutorily unauthorized early termination provisions from the final draft sourcing agreement; and (3) correct typographical and scrivener's errors; and
>
> WHEREAS, No statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-96 and 97-630; and No statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-96 and 97-630; . . ..

(SR 585; HR 755.) CCE respectfully requests that the Commission simply follow the direction given to it by the General Assembly, no more and no less, and enter an Order on Rehearing that approves a Sourcing Agreement in substantially the form of the sourcing agreement attached hereto and made a part hereof as Attachment A.

A. The Commission Should Reverse The Modifications That Were Made To The IPA-Approved Final Draft Sourcing Agreement

A critical component of the framework established by the General Assembly for advancing the clean coal SNG brownfield facility is the administrative process for developing

the Sourcing Agreement between participating natural gas utilities and CCE. (*See* 220 ILCS 5/9-220(h-1), (h-3), s*ee also* CCE Verified Reply Comments at 2-5.)

The January 10 Order improperly suggested that there were no limits upon the Commission's ability to modify the IPA-approved final draft sourcing agreement. Specifically, the January 10 Order suggested that the following additional terms be modified:

- **Billing Determinants** – The January 10 Order improperly revised the "billing determinant" terms in the IPA-approved final draft sourcing agreement. (*See* January 10 Order at 21.) The "billing determinant" concept describes the denominator in a per-MMBtu cost calculation, which effectively sets the percentage of costs that CCE is able to recover under the Sourcing Agreement from sales to Ameren and Nicor. The IPA was clear when it set the billing determinants in no uncertain terms: "For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf" and "For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf." (*See* IPA-approved final draft sourcing agreement at 21.) Based on an impossible and purely hypothetical situation raised by Nicor, the Order incorrectly revised this provision in the IPA-approved final draft sourcing agreement. This revision would result in a 16% shortfall in CCE's capital and O&M recovery, while still requiring CCE to provide 100% of the benefits of the revenue-sharing provisions to Ameren and Nicor's customers. (*See* January 10 Order at 21.) The correct approach would be for the Commission to approve the billing determinant terms of the final draft sourcing agreement submitted to the Commission by the IPA. (*See* CCE Brief on Exceptions at 36-38; CCE Reply Brief on Exceptions at 9-12.) The billing determinant should be set at 43.5 bcf.

- **Annual Output** - The January 10 Order incorrectly stated that CCE and the IPA overstated the anticipated output of the SNG facility, and improperly revised the schedule in the IPA-approved final draft sourcing agreement which is used to calculate the capital and O&M charges. In Schedules 5.2A and 5.2B, the lower value of 44,787,326 MMBtu was used in calculations instead of the IPA-approved Annual Output of 47,799,714 MMBtu. (*See* January 10 Order at Appendix; *see also* Corrected Appendix dated January 11, 2012.) The correct approach would be for the Commission to approve the terms of the final draft sourcing agreement submitted to the Commission by the IPA, and use the Annual Output of 47,799,714 MMBtu for all appropriate calculations. (*See* CCE Brief on Exceptions at 28-30; CCE Reply Brief on Exceptions at 9-12.)

- **Monthly Base Overage Amount** - The January 10 Order incorrectly revised the "Monthly Base Overage Amount" provision in the IPA-approved final draft sourcing agreement, and instead endorsed a figure proposed by Staff that had no support in the evidentiary record. (*See* January 10 Order at 32 *but see* CCE Brief on Exceptions at 44-45.) This term sets the benchmark against which early drawdowns from the Consumer Protection Reserve Account are calculated, if needed. The correct

approach would be for the Commission to approve the "Monthly Base Overage Amount" term contained in the final draft sourcing agreement submitted to the Commission by the IPA.

1. The IPA Was Authorized To Finalize The Fundamental Terms And Conditions Of The Sourcing Agreement

The IPA has played a critical role in finalizing the terms and conditions of the Sourcing Agreement. Pursuant to Section 9-220(h-1) of the Act, the IPA alone is authorized to "revise the draft sourcing agreement as necessary to confirm that the final draft sourcing agreement contains only terms that are reasonable and equitable." (220 ILCS 5/9-220(h-1).) In accordance with the Act, the IPA did revise the draft sourcing agreement and transmitted to the Commission the IPA-approved final draft sourcing agreement on October 11, 2011, with substantially all of the provisions to be included in the final, Commission-approved Sourcing Agreement. The IPA contemporaneously transmitted a Memorandum (the "IPA Memo") that set forth the basis for the IPA deciding several of the more contentious items. (The IPA Memo and the IPA-approved final draft sourcing agreement were filed in the instant proceeding on November 7, 2011, and are referred to herein as the "IPA Final Decision.")

The importance -- and finality -- of the IPA's Final Decision regarding the IPA-approved final draft sourcing agreement is underscored by the limited review that the General Assembly directed the Commission to undertake in the instant proceeding. (*See* 220 ILCS 5/9-220(h-4).) The expansive role for the IPA in developing the sourcing agreement, and the limited role for the Commission, are not surprising. From the outset, the IPA was very involved with evaluating the details of the CCE project. The IPA was the agency that spent the better part of a year reviewing, analyzing, and verifying the $10 million facility cost report associated with the CCE project; the Commission played no part in that analysis. (*See* 20 ILCS 3855/1-56.) The IPA also

was called upon repeatedly as part of the legislative drafting process to offer its insights regarding the CCE project, the structure of the legislation, and related issues.

The Commission's role with the CCE project stands in stark contrast to the Commission's role in reviewing the facility cost report for Tenaska's Taylorville project. (*Compare* 20 ILCS 3855/1-75(d)(4)(i)-(ii) *with* 20 ILCS 3855/1-56.) Thus, with regard to the CCE project, it is understandable that the IPA, with its knowledge of details underlying the CCE project was called upon to develop the final draft sourcing agreement.

Further, while there are some procedural differences, the statutory provisions associated with the Power Holdings project show that the General Assembly was comfortable with the IPA acting as an arbiter of SNG contract terms. (*Compare* 220 ILCS 5/9-220(h) *with* 220 ILCS 5/9-220(h-1).) Just as with the Power Holdings SNG project, the IPA alone is authorized to review and modify the substantive terms and conditions of the contract between developer and Nicor and Ameren. The Commission was not authorized to review, much less revise, any of the terms of the contract between the Power Holdings clean coal SNG facility and the natural gas utilities. (*See* 220 ILCS 5/9-220(h).)

There is no legitimate question that the General Assembly empowered the IPA -- not the Commission -- to finalize the fundamental terms and conditions of the Sourcing Agreement.

2. The Commission Lacks The Authority To Modify The IPA-Approved Final Draft Sourcing Agreement To The Extent Not Explicitly Granted By The Act

Following the conclusion of the IPA process and prior to the Commission issuing any substantive Order in the instant proceeding, the General Assembly considered and passed House Bill 691 with super-majorities in both chambers, which was signed into law by Governor Quinn

on December 8, 2011 as Public Act 97-0630. As a result, Section 9-220(h-4) of the Act now provides:

> No later than 90 days after the Illinois Power Agency submits the final draft sourcing agreement pursuant to subsection (h-1), **the Commission shall approve a sourcing agreement containing (i) the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3) and (ii) all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement; provided, however, the Commission shall correct typographical and scrivener's errors and modify the contract *only* as necessary to provide that the gas utility does not have the right to terminate the sourcing agreement due to any future events that may occur other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment.** Once the sourcing agreement is approved, then the gas utility subject to that sourcing agreement shall have 45 days after the date of the Commission's approval to enter into the sourcing agreement."

(220 ILCS 9-220(h-4). (Emphasis added.)) This provision assigns the Commission narrow authority; no statutory authority exists for a wider scope of Commission review beyond the specific tasks delineated in the provision. Specifically, at this time, the Commission only is to:

i. include the capital costs, operations and maintenance ("O&M") costs, and rate of return, each determined in accordance with Section 9-220(h-3);

ii. correct typographical and scrivener's errors; and

iii. modify the termination provisions to limit the circumstances under which the contract may be terminated.

(*See* 220 ILCS 9-220(h-4).) The Commission has **no** authority to modify or add other terms, conditions, rights, provisions, exceptions, and limitations -- **nothing else** in the IPA-approved final draft sourcing agreement **can be revised** by the Commission. In the words of the General Assembly: "No statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-96 and 97-630 . . .." (SR 585; HR 755.)

The Commission lacks any "implied powers" that would authorize it to act beyond the Act's narrow confines. (*See Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd* 955 N.E.2d 1110 (Ill. 2011) ("The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction."); *see also Harrison Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 523, 797 N.E.2d 183, 189 (5th Dist. 2003) (same), *aff'd* 212 Ill. 2d 237, 817 N.E.2d 479 (2004).) Indeed, the General Assembly thought that the Commission's authority to modify the IPA-approved final draft sourcing agreement was so limited under the original statutory format established by Public Act 97-0096 that the General Assembly had to explicitly authorize the Commission to correct the typographical errors as part of Public Act 97-0630.

Absent specific guidelines, general provisions in the Act are insufficient to authorize the Commission to review the decisions of the IPA. (*See Landfill, Inc. v. Pollution Ctl. Bd.*, 74 Ill. 2d 541, 558-559, 387 N.E.2d 258 (1978); *Nat'l Marine Serv. Inc. v. Ill. Env. Prot. Ag.*, 120 Ill. App. 3d 198, 205-206, 458 N.E.2d 551 (4th Dist. 1983).) To be sure, the Commission's authority to review the IPA-approved final draft sourcing agreement *could* be more expansive under a different statutory framework. For example, the Commission possesses broad statutory authority to review the IPA's procurement plans. (*See* 220 ILCS 5/16-111.5(d)(4) (The Commission shall approve the procurement plan ". . . **if the Commission determines** that it will ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability" (emphasis added)**.**) In contrast, with respect to the IPA-approved final draft sourcing agreement, the Commission's authority is explicitly constrained. Section 9-220(h-4) does not provide authority

or any "specific guidelines" for the broad review that the Order undertakes. On the contrary, Section 9-220(h-4) plainly limits the authority it confers upon the Commission.

The expedited time table that the General Assembly gave to the Commission -- providing just 90 days for the Commission proceeding -- further underscores the point that the Commission is not meant to investigate, evaluate, or "re-cut" the fundamental provisions of the IPA-approved final draft sourcing agreement. (*See id.*) Given the expedited schedule, consistent with the Commission's very limited role, the Commission did not even attempt to take evidence in the instant proceeding, instead relying solely upon parties' statements of their position.

Accordingly, Chicago Clean Energy respectfully requests that the Commission enter an Order on Rehearing reversing the portion of the January 10 Order which directed revisions to the IPA-approved final draft sourcing agreement beyond the removal of the two (2) improperly-included early termination provisions and the correction of typographical and scrivener's errors.

3. The Commission Lacks Authority To Modify The IPA Final Decision Regarding The Projected Annual Output, Monthly Base Overage Amount, And Billing Determinants

The January 10 Order incorrectly modified the anticipated annual output, Monthly Base Overage Amount, and Billing Determinants components of the IPA-approved final draft sourcing agreement. As explained below, those decisions were beyond the legal authority of the Commission under the applicable statute and, assuming *arguendo* that the Commission possessed the statutory authority to change those items, the decision to make each such modification was substantively incorrect.

a. Projected Annual Output

The "Projected Annual Output" of the CCE Project is the amount of SNG that the facility is anticipated to be able to produce. The IPA-approved final draft sourcing agreement clearly defined the Projected Annual Output of the CCE Project as 47,799,714 MMBtu (or 48.935 Bcf).

(*See* IPA-approved Final Draft Sourcing Agreement, Schedule I at 15 (Definition of "Projected Annual Output"); IPA Memo at 17.) As reflected in the IPA Memo, this decision was based in large part upon the IPA's intimate familiarity with the $10 million facility cost report that the IPA reviewed and endorsed:

> Public Act 97-0784 authorized CCE to conduct a Facility Cost Report, detailing the projected annual output of the CCE facility. According to that report, the projected annual output of the facility is 47,799,714 MMBtu.
>
> CCE proposed contract terms that would obligate Nicor and Ameren to purchase a pro rata share of the projected annual output of 47,799,714 MMBtu (48.935 Bcf), or a combined amount of 40,151,759 MMBtu (41.5 Bcf) between both Ameren and Nicor. Ameren and Nicor proposed terms that would require them to purchase no more than their pro rata share of 43,500,000, or 36,540,000 MMbtu. The IPA adopted terms which it believes is most consistent with P.A. 97-0096, which requires the utilities to purchase no more than 42% of the *projected annual output* of 47,799,714 MMBtu (48.935 Bcf.)

(IPA Memo at 17-18.) (Emphasis in original.)

There is absolutely no statutory authority for the Commission to modify the IPA Final Decision that established the Projected Annual Output of the CCE Project. As has been repeatedly noted, Section 9-220(h-4) specifically constrains the Commission's ability to review the provisions of the IPA-approved final draft sourcing agreement. Absent an argument (which no party has advanced) that this revision reflects a typographical or scrivener's error, the Commission ***cannot*** modify this provision in the IPA-approved final draft sourcing agreement. (*See* 220 ILCS 5/9-220(h-4).) In addition, the IPA cannot request an informal rehearing of the IPA's Final Decision, nor can the Commission facilitate such a reconsideration. (*See Pearce Hosp. v. Public Aid Comm'n*, 15 Ill.2d 301, 307, 154 N.E.2d 691 (1958); *Village of Downers Grove v. Ill. St. Labor Relations Bd.*, 221 Ill. App. 3d 47, 56-57, 581 N.E.2d 824 (2d Dist. 1991); *Reichhold Chem., Inc. v. Ill. Pollution Control Bd.*, 204 Ill. Appl 3d 674, 678, 561 N.E.2d 1343 (3d Dist. 1990); *Caldwell v. Nolan*, 167 Ill. App. 3d 1057, 1059, 522 N.E.2d 175 (1st Dist.

1988).) Therefore, even if the IPA supports a change to this term, the Commission does not have authority to revise the Projected Annual Output. Nevertheless, the January 10 Order would overrule the finding in the IPA Final Decision regarding the clean coal SNG brownfield facility's anticipated annual output, and instead adopt the terms that were proposed by Ameren and Nicor and explicitly rejected by the IPA. (*See* January 10 Order at 21.)

Even assuming that the Commission had authority to modify the IPA-approved final draft sourcing agreement regarding the Projected Annual Output, the analysis in the January 10 Order, respectfully, was simply wrong. The January 10 Order endorsed a figure that is unreasonable and that fails to comport with the treatment of the Projected Annual Output equivalent for the clean coal SNG facility to be developed by Power Holdings. (*See* CCE Brief on Exceptions, Attachment C (Hudson Affidavit) at ¶¶ 30-45.) The January 10 Order's finding is particularly problematic because decreasing the Projected Annual Output will have a cascading effect, which includes negative impacts on participating utility purchases of SNG, customer savings (and cost recovery) through sales, and ultimately the financeability of the project. (*See* CCE Brief on Exceptions, Attachment B (Maley Affidavit) at ¶ 9.) Specifically, the January 10 Order reduced the anticipated annual output by 6%, and because this number is used as a denominator, this has the effect of raising the SNG contract price by 6%. (*See* January 10 Order, Appendix at 1.) This increased price would have the effect of reducing consumer savings, thus impairing CCE's ability to meet its obligation to save consumers $100 million over the contract term, and therefore its ability as well to ever secure financing. There is no legally justifiable basis for the Commission to have modified the Projected Annual Output:

- First, the State of Illinois spent $10 million to develop a facility cost report that analyzed the details of the CCE Project. That facility cost report was vetted fully by the IPA and its outside experts, and the results of that facility cost report were reported to the General Assembly. (*See* Public Act 96-0781.) As correctly observed by the IPA, that facility cost report concluded that the projected annual output of the facility is 47,799,714 MMBtu. (*See* IPA Memo at 17.) There is no legitimate basis to challenge the conclusion of that analysis.

- Second, the IPA's Final Decision was consistent with recent IPA precedent that was accepted by Nicor and Ameren. As part of the contract approval process for the Power Holdings clean coal SNG facility, pursuant to Public Act 097-0239, the IPA was required to determine its projected annual output. CCE and Power Holdings are using the same exact technology to manufacture SNG -- the only material difference is that CCE is planning on installing one less gasifier unit (four active units instead of five, with each having one spare). (*See* November 18, 2011, Staff of the Illinois Commerce Commission's Motion to Take Administrative Notice of Certain Submissions, Exhibit 1(b) at 2 and Power Holdings Overview at 5, available at http://powerholdingsllc.com/SouthernIllinoisCoaltoSNGPresentation.pdf, last checked April 8, 2012.) With 4/5 of the gasification capacity of Power Holdings, the CCE clean coal SNG brownfield facility should have 20% less output than the Power Holdings clean coal SNG facility. The IPA found that the Power Holdings clean coal SNG facility has a capacity of 60,079,000 MMBtu/year, and this determination was accepted by Nicor and Ameren. (*See* IPA Memo at 3.) Using the exact same analysis that Nicor and Ameren accepted, the IPA found that CCE's clean coal SNG brownfield facility has a capacity of 47,799,714 MMBtu, which is almost exactly 20% lower than the output approved for the Power Holdings clean coal SNG facility. However, the anticipated annual output specified in the Appendix of the January 10 Order was 44,787,326, which is 25% lower than the approved Power Holdings projected annual output and therefore

not consistent with the IPA-approved value for Power Holdings. Given that the proposed facilities are nearly identical but for scale, there is no justification from a design and engineering basis for the anticipated output for CCE and Power Holdings to differ, but for a factor of scale.

- Third, January 10 Order improperly relied upon documents referenced by Staff that are not in the evidentiary record. The Act is clear: "The court shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that. . .**[t]he findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission** for and against such rule, regulation, order or decision . . .." (220 ILCS 5/10-201(e)(iv) (emphasis added).) There is no such record evidence; instead, there is only Staff's unverified Statement of Position referencing a document entitled "Chicago Clean Energy SNG Project Facility Cost Report" that is not in the evidentiary record. (*See, e.g.,* Staff Statement of Position at 19-21 (making multiple references).) It is unclear how the January 10 Order possibly could have concluded that Staff's unverified summary document should be given more weight than the IPA Final Decision that was based upon years of working with the underlying source documents.

- Fourth, if the Commission lowers the Projected Annual Output, the calculated Capital Recovery Charge and O&M Recovery Charge would increase, impacting customer savings, cost of debt, and Return on Equity calculated in the Commission's December 7, 2011 Interim Order ("December 7 Interim Order"). Simply put, the lower volume of Projected Annual Output, the fewer "units" over which to recover the same CDB-fixed capital and O&M costs and Commission-fixed Rate of Return. Mathematically, a reduction in Projected Annual Output from the IPA-approved value of 47,799,714 MMBtu to the Staff suggestion of 44,787,326 MMBtu is a 6% reduction. Because this number is the denominator in the price calculation, this will correspondingly result in a 6% increase in the price of the SNG to consumers. (*See* January 10 Order, Appendix at 1-2.) This 6% increase in SNG price across every year of the 30-year sourcing agreement will

unnecessarily harm consumers. These changes would make it progressively less likely that customers will see savings from purchase of SNG.

For the foregoing reasons, CCE implores the Commission to reverse the portion of the January 10 Order that modified the IPA's Final Decision related to the Projected Annual Output. The Commission lacks the authority to alter the IPA–approved final draft sourcing agreement in the first place, but even if the Commission had legal authority, the decision to modify it would be substantively unjustified.

b. Monthly Base Overage Amount

The Monthly Base Overage Amount essentially governs the timing under which funds from the Customer Protection Reserve Account ("CPRA") are released. Although the Act requires $100 million in customer savings be granted over the course of the contract, customers in any given year will receive payouts from the CPRA when the price of SNG exceeds market prices. (*See* 220 ILCS 5/9-220(h-2).) Thus, although the Monthly Base Overage Amount does not impact the total savings that customers will see, incorrectly setting the Monthly Base Overage Amount will lead to drawdowns of the CPRA that are either greater than or less than what the drawdown should be.

The January 10 Order erred in two ways. First, the Commission should not even have considered Staff's proposed modification to the Monthly Base Overage Amount, because it did not fall under any of the permitted categories of revisions articulated in Section 9-220(h-4) of the Act. Second, to the extent that the Order implicitly interpreted Staff's statement that "Staff does not know how CCE or the IPA derived the figure of $174 million used in the above definition (or if it is a scrivener's error)" as meaning that Staff was identifying a scrivener's error -- a finding the January 10 Order did not make -- Staff provided inadequate justification for the alleged error or potential corrections.

The Commission plainly lacks the statutory authority to alter the Monthly Base Overage Amount because alteration to the number is not among the enumerated changes that the Commission may make. (*See* 220 ILCS 5/9-220(h-4).) The January 10 Order did not address this issue with the other scrivener's or typographical errors, and did not make a finding that its change was in response to a typographical or scrivener's error. Further, the IPA observed that Staff was not simply suggesting that there was a scrivener's error: "The IPA believes that the recommendations made by Staff are substantive changes to the Form SNG Agreement, not merely a typographical or scrivener's error." (IPA Response to the Parties' Statements of Position at 4.) The Monthly Base Overage Amount is just one of numerous terms in the IPA-approved final draft sourcing agreement that the Commission is not authorized to review.

However, even to the extent that the Order or the Commission attempt to shoehorn Staff's proposed change into the category of a scrivener's error to circumvent the limits on the Commission's authority in Section (h-4), the change still should not be implemented. No proof has ever been provided that IPA's calculation of this figure was somehow flawed. In fact, it is a quantity which is impossible to calculate empirically with available data -- the determination of Base Overage Amount required the IPA to engage in a certain amount of extrapolation, and posit a number of assumptions to arrive at its figure. Staff acknowledged that to perform the calculation "the amount of non-utility revenues collected from transportation customers for unbundled gas sales is unknown, and therefore must be imputed." (*See* Staff Statement of Position at 11.)

The IPA, with its expertise in energy procurement and involvement with the CCE project and the related legislative process, was well-equipped to impute the figures for the calculations

necessary to set the Monthly Base Overage Amount, and the law requires all parties to accept the IPA's judgment, despite any disagreement on specifics.

c. Billing Determinants

The "billing determinant" concept describes the use of the "Annual Contract Quantity" as the denominator in a per-MMBtu cost calculation, which effectively sets the percentage of costs that CCE is able to recover under the Capital Component and O&M Component of the Sourcing Agreement.

The billing determinants were clearly set forth in the IPA-approved final draft sourcing agreement: "For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf." And "For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf." (*See* Final Draft Sourcing Agreement, Sections 5.2A and 5.2B.) With the billing determinant of 43.5 bcf, by Staff's analysis, the IPA-approved final draft sourcing agreement set an effective cost recovery percentage of 95.45%. (*See* January 10 Order at 13 ("Staff also says before taking into account savings guarantees and revenue sharing, the base level implied by the IPA's Final Draft Sourcing Agreement is approximately 95.45%.").)

The January 10 Order incorrectly revised the billing determinants (effectively the same issue as "cost recovery percentage") in the IPA-approved final draft sourcing agreement, setting a cost recovery percentage of 84%. (*See* January 10 Order at 21.) Therefore, mathematically the effect of the change in billing determinants in the Order is an 11.45% reduction in cost recovery (95.45% - 84%). As a result, under the terms of the January 10 Order, CCE would experience an insurmountable shortfall in CCE's capital and O&M recovery. CCE respectfully requests that the Commission revise this portion of the January 10 Order, and approve the billing determinant terms of the IPA-approved final draft sourcing agreement. (*See* CCE Brief on Exceptions at 36-38; CCE Reply Brief on Exceptions at 9-12.) The billing determinant should be set at 43.5 bcf.

The January 10 Order's 11.45% reduction in cost recovery has the direct effect of reducing the previously-approved base Return on Equity for CCE by 11.45%. This is because CCE's only base Return on Equity is recovered through the capital charge, which is calculated using this cost recovery percentage. (*See* January 10 Order, Appendix at 1.) Reducing the cost recovery percentage by 11.45% thus reduces CCE's base return on equity by the same 11.45%, from 4.44% to 3.93% (4.44% x (100% - 11.45%)). This means that the January 10 Order ***directly contradicts*** the December 7 Interim Order, which set the base Return on Equity at 4.44%: "as required by Section 9-220(h-3)(1)(B) of the Act, a commercially reasonable base rate of return on equity should be set at 4.44%." (*See* December 7 Interim Order at 11.) Significantly, no party requested rehearing of the Commission's December 7 Interim Order; nevertheless, the January 10 Order was directly contrary to the unchallenged prior Commission approvals in this regard. There is no legal or policy basis for the Commission to reverse its December 7 Interim Order.

The January 10 Order was also contrary to Section 9-220(h-3)(2) of the Act, which provides: "Operations and maintenance costs approved by the Commission **shall be recoverable** by the clean coal SNG brownfield facility **under the sourcing agreement**." CCE's only assured means of recovering O&M costs is through the Commission-approved O&M Component, through sales of SNG to Nicor and Ameren up to the Annual Contract Quantity specified in the sourcing agreement. There is no assurance that O&M costs can be recovered through any other means in the sourcing agreement. The January 10 Order reduced the cost recovery percentage from the IPA-approved 95.45% to 84%, which is used to calculate the O&M component. (*See* January 10 Order, Appendix at 2.) By reducing the O&M component by 11.45% from the IPA-approved values, CCE is no longer able to recover O&M costs as required by the Act.

Similarly, the January 10 Order was contrary to Section (h-3)(1)(B) of the Act, which specifies that "Rate of return shall be comprised of the clean coal SNG brownfield facility's actual cost of debt, including mortgage-style amortization, and a reasonable return on equity." CCE's only assured way of recovering its actual cost of debt is through the capital recovery charge, which in the Order is modified by the 84% cost recovery percentage. (*See* January 10 Order, Appendix at 1.) There is no assurance that CCE can recover the cost of debt by any other means in the sourcing agreement. Again, just as occurred with the return on equity and the O&M costs, the change in billing determinants improperly disallows CCE from recovering its actual cost of debt. By the calculations in the January 10 Order, the amount of debt service recovered by CCE is reduced 11.45% from the IPA-approved values. This is a direct violation of the Act, which is clear that the "actual cost of debt" is required to be recovered under the sourcing agreement. (220 ILCS 5/9-220(h-3)(1)(B).)

Although the January 10 Order exceeded the Commission's authority and jurisdiction on several issues, the issue of billing determinants requires special attention because -- unlike other issues -- the January 10 Order claimed that the Commission has implied statutory authorization based on other duties. (*See* January 10 Order at 21.) However, looking specifically at the statutory language, there is no authority -- express or implied -- for the Commission to modify the IPA Final Decision regarding billing determinants.

The January 10 Order suggested that Section 9-220(h-3)(1) could be read to imply that the Commission is authorized to modify the billing determinants. (*See id.*) Section 9-220(h-3)(1) references a "capital recovery charge" that is "approved" by the Commission and quotes a portion of the introductory language in that subsection. In full, that statutory language reads as follows:

> (h-3) Recoverable costs and revenue by the clean coal SNG brownfield facility.
> (1) A capital recovery charge approved by the Commission shall be recoverable by the clean coal SNG brownfield facility under a sourcing agreement. **The capital recovery charge shall be comprised of capital costs and a reasonable rate of return**. "Capital costs" means costs to be incurred in connection with the construction and development of a facility, as defined in Section 1-10 of the Illinois Power Agency Act, and such other costs as the Capital Development Board deems appropriate to be recovered in the capital recovery charge.

(220 ILCS 5/9-220(h-3)(1) (emphasis added).) Under this provision, the approval by the Commission is simply a combination of two components: (1) the capital costs (established based upon CDB's analysis); and (2) the reasonable rate of return (which the Commission has previously established in this docket). This interpretation is consistent with the more general direction given the Commission in Section 9-220(h-4) to "approve" the sourcing agreement: "the Commission shall approve a sourcing agreement containing (i) the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3) . . .".." (220 ILCS 5/9-220(h-4).) If the term "approve" were to include the implied authority to modify, then the Commission would have the authority to modify the entirety of the IPA-approved final draft sourcing agreement. However, there is no suggestion in the Act that the Commission is to examine or reconsider the billing determinants -- or any other contract term other than the early termination provisions -- that the IPA previously approved.

Indeed, if the General Assembly believed that it was improper for the IPA to decide the issue of billing determinants, it had the opportunity to direct the Commission to revisit this issue. Importantly, P.A. 97-0630 was introduced, passed with super-majorities in both chambers, and signed into law ***after*** the IPA approved the billing determinants in the IPA Final Decision (*i.e.*, the IPA-approved final draft sourcing agreement). Rather than giving the Commission new, additional authority to re-examine the billing determinants issue, the General Assembly did the exact opposite, explicitly requiring that the Commission approve "***all other terms and***

conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4).) The Resolutions that were subsequently adopted by both the Senate and the House likewise emphasized that the Commission was not to change anything in the IPA-approved final draft sourcing agreement that would impact CCE's ability to recover its costs. (*See* SR 585, HR 755 ("we express serious concerns that the Illinois Commerce Commission Order entered on January 10 . . . modifies the final draft sourcing agreement with respect to recovery of costs despite the Commission lacking statutory authority to do so and despite the statutory language and legislative intent of Public Act 97-96 to provide full cost recovery to the Chicago Clean Energy project . ...").) The Act provides the Commission with *no authority* to alter the all-in capital recovery charge other than set it according to the mechanical methodology required by the Act. (*See* 220 ILCS 5/9-220(h-3)(1)(A).) The General Assembly created an approval process for the overwhelming majority of contract terms -- including billing determinants and other areas not specifically identified for Commission discretion -- that involves other agencies instead of the Commission, whose work the Commission "shall approve" in the Sourcing Agreement. (*See* 220 ILCS 5/9-220(h-4).)

It also appears that the January 10 Order embraced Nicor's "cost causation" argument that -- while potentially appealing on its surface for its simplicity -- disregards the complexity of the compromise embodied in the Act and the IPA-approved final draft sourcing agreement. In advancing the utility ratemaking principle of cost causation, Nicor ignored the non-utility construct of the Sourcing Agreement, which includes a customer savings guarantee and a revenue sharing mechanism. (*See* Nicor Statement of Position at 7.) Although cost causation

oftentimes is a reasonably straightforward principle when analyzing standard utility facilities, CCE is not aware of any single utility asset for which customers:

- Benefit from guaranteed minimum savings over the life of the asset and a hedge against increasing natural gas prices (*see* 220 ILCS 5/9-220(h-2); IPA-approved final draft sourcing agreement at Section 12.7 (procedure for administering Customer Protection Reserve Account));

- Receive a 50% stake in **revenue** generated by sales to third parties and 50% sharing of below-market costs (*See* IPA-approved final draft sourcing agreement at Section 5.4 (allocation of Net Incremental Revenue) and 5.5 (Adjustments for Consumer Protection Reserve Account); *id.* at Schedule I (defining Net Incremental Revenue));

- Are fully protected from cost overruns for the construction and O&M of the facility by virtue of a fixed, pre-approved capital and O&M recovery charge (*See* 220 ILCS 5/9-220(h-3); and

- Pay for only a 4.44% base return on equity. (*Cf.* ICC Docket No. 08-0363, Final Order dated March 25, 2009 at 52, 72 (Nicor Gas requesting 11.5% return on equity, Commission allowing 10.11%).)

Thus, even assuming the Commission possessed the authority to review the billing determinant, which it does not, it would be inappropriate to only review the cost allocation separately from the other revenue sharing elements, because that calculation fails to accurately capture the customer benefits associated with the non-utility structure.

In addition, it seems that the January 10 Order accepted Nicor's suggestion that Nicor could potentially get stuck with 100% of the costs of the CCE project if Nicor were the only participating utility. (*See* January 10 Order at 21-22; Nicor Gas Statement of Position at 8.) Nicor's suggestion is absurd. First, there is no possibility that there will be only one participating utility, because the deadline for a utility to opt out of the Sourcing Agreement and to instead elect to file biennial rate cases has long passed, thus committing Ameren as well as Nicor to participation. (*See* 220 ILCS 5/9-220(h-1).) Second, under Nicor's scenario, a number of additional factors would have changed in the development of the IPA-approved final draft sourcing agreement (for example, the contract could have been presented as a financial contract

for differences rather than requiring physical delivery). Third, even if the IPA had arrived at a conclusion that Nicor disputed, it could properly raise the issue before a Circuit Court on administrative appeal -- as Nicor has, in fact, elected to do on several issues. (*See, e.g.*, Nicor Gas Statement of Position, Exhibit A.) Fourth, the Commission could have taken this circumstance into account in adjusting the rate of return for the facility. Finally, in the end, if Nicor were the only purchasing utility, ratepayers in Nicor's service territory would receive the full benefit of the $150 million Consumer Protection Reserve Account (and it being replenished at the rate of $50-$100 million annually) and the $100 million in guaranteed savings. There are clearly ample protections for avoiding Nicor's hypothetical results without the Commission exceeding its statutory authority.

In short, the Commission lacks the authority to alter the IPA's prior decision regarding billing determinants. Furthermore, the improper modification of the billing determinants directly contradicts a previously-approved December 7 Interim Order, is based upon an incomplete view of the various trade-offs that underlie the Act and is designed to address hypothetical problems that have no possibility of materializing.

4. The Commission Should Reject The IPA's Requests To Reverse Decisions That The IPA Made In Issuing The Final Draft Sourcing Agreement

An additional complicating factor has been injected into this proceeding as a result of statements by the IPA in this proceeding by which the IPA apparently seeks to reverse portions of the IPA Final Decision it made in the underlying proceeding in which the IPA itself reviewed and issued the IPA-approved final draft sourcing agreement. As discussed herein, the IPA's attempt to reverse itself is contrary to Illinois law. Unfortunately, the January 10 Order accepted

certain of the IPA's arguments, leading to a situation in which the Order, if approved by the Commission on rehearing, would plainly constitute reversible error.

On December 20, 2011, the IPA elected to file the IPA Response to the Parties' Statements of Positions ("IPA Response"), in which the IPA responded to and commented on issues that other parties raised regarding the IPA's Final Decision. Surprisingly, the IPA supported positions advanced by other parties that were directly contrary to the IPA's Final Decision. (*See, e.g.*, IPA Response at 2-5.) In effect, the IPA attempted to create an informal reconsideration process, which it apparently anticipated would culminate in substantive changes to the IPA-approved final draft sourcing agreement that are outside the scope of Section 9-220(h-4) of the Act. (*See* 220 ILCS 5/ 9-220(h-4).) Such a procedural maneuver is outside the IPA's authority as set forth in the Illinois Power Agency Act, and is contrary to the Administrative Review Law and Section 9-220(h-4) of the Act. (*See* 20 ILCS 3855/1-101 *et seq.* (no formal rehearing or review process); 220 ILCS 5/9-220(h-1)-(h-3) (setting out process for drafting of Sourcing Agreement but not including process for review of IPA-approved final draft sourcing agreement; 735 ILCS 5/3-103 (setting out procedures for review of administrative decisions); *Village of Downers Grove v. Ill. St. Labor Relations Bd.*, 221 Ill. App. 3d 47, 56-57, 581 N.E.2d 824 (2d Dist. 1991) (an agency may not rehear a matter if not authorized in agency statute); *People ex. rel. Olin Corp. v. Dept. of Labor*, 95 Ill. App. 3d 1108, 420 N.E.2d 1043 (5th Dist. 1981) (same).)

The decisions upon which the IPA has sought rehearing include:

- **The IPA's reversal of its position on billing determinants.** In supporting Nicor's argument regarding billing determinants, the IPA reversed the position from its Final Decision without any supporting evidence or explanation as to why it is taking an inconsistent position with the Final Decision. (*See* IPA Response at 2, 4.)

- **The IPA's request for a completely new section to address sequestration.** In supporting the Attorney General's argument that certain sections regarding carbon sequestration should be added to the IPA-approved final draft sourcing agreement, the IPA improperly suggested that its own Final Decision was deficient, and failed to identify any statutory provision vesting the Commission with authority to add new provisions in the instant proceeding. (*See* IPA Response at 5.)

The IPA has no authority to request that the Commission reconsider the IPA Final Decisions, and the Commission has no authority to grant the request. CCE respectfully requests that the Commission ignore all IPA statements that advocate for substantive changes to the IPA's Final Decision.

B. The Commission Should Remove The Additional Obligations That The January 10 Order Added To The IPA-Approved Final Draft Sourcing Agreement

Just as the Commission does not possess authority to change the terms of the IPA-approved final draft sourcing agreement, the Commission lacks the statutory authority to impose additional obligations upon CCE. Without citing any statutory authority, the January 10 Order included requirements that CCE:

- **Obtain a Third-Party Guarantor** – The January 10 Order incorrectly added a requirement that CCE obtain third-party guarantor. This new obligation would require CCE to have a third-party - such as CCE's parent company - guarantee the obligation to deliver the Guaranteed Consumer Savings. As Staff itself recognized in suggesting this additional obligation, adding this requirement is not within the Commission's purview in this proceeding. (*See* CCE Brief on Exceptions at 41-42.) Furthermore, CCE has provided expert analysis from The Brattle Group, attached to Verified Application for Rehearing as Attachment E, that shows alternatives for how CCE could adapt to future market conditions and significantly increase the residual value of the facility, to address almost all hypothetical outlier future scenarios that apparently motivated the suggestion for a third-party guarantor requirement.

- **Make a Capital Structure Report** – The January 10 Order included a requirement that CCE make a compliance filing with the Commission after it "issues the debt" about CCE's actual capital structure that will impact cost recovery. Under the terms of the Act, CCE's recovery from ratepayers is to vary based upon its cost of capital; it is not to vary with its capital structure. Further, it will not be possible to determine CCE's final capital structure until after CCE has finished its capital spend (since equity holders are required to absorb cost overruns). This additional requirement is

unauthorized, inappropriate, and should be deleted. (*See* CCE Brief on Exceptions at 46-48.)

- **Refer to its Carbon Sequestration Obligations** – The January 10 Order endorsed a request of the Attorney General's Office requiring that the final draft sourcing agreement include a reference to the clean coal SNG brownfield facility's duties under Section (h-5) of the Act (220 ILCS 5/9-220(h-5)). (*See* AG Statement of Position at 1-3.) The AG's request is premature, because although the Commission lacks authority to add terms to the IPA's final draft sourcing agreement, the Commission does have a future a duty to approve the clean coal SNG brownfield facility's Carbon Capture and Sequestration Plan, which will be attached as an appendix to the Sourcing Agreement. (*See* Final Draft Sourcing Agreement at Schedule 5.2D (currently labeled "To be attached after ICC approval of the Carbon Capture and Sequestration Plan").) In its Brief on Exceptions, the AG suggested that an acceptable alternative is for the Final Order to specify that a Carbon Capture and Sequestration Plan proceeding will indeed occur. This step, which is within the Commission's authority, would be an appropriate remedy to satisfy the AG's need for confidence that the monitoring and reporting issues critically necessary for proper enforcement can be properly addressed. (*See* 220 ILCS 5/9-220(h-7)(2).) (*See* January 10 Order at 20, 32, 33.)

The General Assembly has already set forth a comprehensive set of obligations upon the facility. (*See, e.g.,* 220 ILCS 5/9-220(h-1)(1)-(17).) While CCE appreciates the consumer perspective that apparently underlies the Commission's desire to impose further obligations upon the facility, the Commission was not empowered to supplement or modify the obligations established by the General Assembly or obligations already thoroughly negotiated during the mediation process overseen by IPA. Further, based upon the information provided to the Commission both previously and in the instant filing, these additional obligations are not necessary and would undermine the financeability of the facility.

CCE respectfully requests that the Commission grant remove these additional obligations because (1) the Commission lacks the statutory authority to impose them; and (2) the additional obligations are factually unjustified.

1. Third Party Guarantee Requirement

The January 10 Order created out of whole cloth a new requirement at Staff's urging, that CCE be required to find a guarantor for the $100 million in guaranteed customer savings. (*See* January 10 Order at 32.) The mandate for this additional requirement must fail for two reasons: (1) the Commission lacks the statutory authority to add such a term to the IPA-approved final draft sourcing agreement; and (2) the term is unreasonable and contrary to the structure that already has been endorsed by the Commission. As a result, CCE respectfully requests that the Commission enter an Order on Rehearing that makes it clear that CCE need not obtain a third-party guarantor.

The Act requires that the SNG brownfield facility guarantee the $100 million savings requirement, but does not specify the means by which that guarantee is to be enforced, and certainly does not require that CCE find guarantor. (*See* 220 ILCS 5/9-220(h-2)(6).) Neither that statutory provision nor any other delegates any authority to the Commission on this issue. On the contrary, like the other terms and conditions in the IPA-approved final draft sourcing agreement, the mechanism for enforcing the Savings Guarantee was the subject of negotiations and mediation during the IPA process of developing the final draft sourcing agreement, taking into account the scenario considered by Staff and many others. The IPA's decision on this issue is codified in Sections 2.6, 2.7, and 2.8 of the IPA-approved final draft sourcing agreement. (*See* IPA-approved Final Draft Sourcing Agreement at 8-9.) The agreed-to language in the IPA-approved final draft sourcing agreement is a sophisticated compromise between the utilities, CCE, and the IPA designed to balance the protections afforded to the ratepayers with that of the other project stakeholders. Any additional terms added outside of the context of that IPA process will topple this delicate balance and undo the compromise.

The Act simply does not authorize the Commission to impose additional obligations. Both the Senate and the House addressed the Commission's lack of authority to impose this particular requirement: "we express serious concerns that the Illinois Commerce Commission Order entered on January 10 . . . imposes an obligation to secure a third-party guarantee that is contemplated nowhere in statute, that exceeds the limited role envisioned for the Commission, and that is in addition to the substantial consumer protections already set forth in the statutory framework for the Chicago Clean Energy project . . .." (SR 585; HR 755.)

The January 10 Order adopted Staff's recommendation that CCE be required to obtain a corporate guarantee as a further assurance for the Guaranteed Consumer Savings. Apparently, there was some concern that the policies established by the General Assembly did not adequately protect consumers. However, the Commission was not empowered to re-evaluate the General Assembly's decision or impose additional conditions upon CCE. Indeed, it is not appropriate for the Commission to substitute its policy judgments for those of the General Assembly: "The Illinois Appellate and Supreme Courts have consistently held that public policy in Illinois is expressed by the General Assembly, and it is not the province of an administrative agency to inquire into the wisdom and propriety of the legislature's act or to substitute its own judgment for that of the legislature . . .." (SR 585; HR 755.) Staff candidly admitted this point: "It is not clear to the Staff that the matter discussed *infra* is clearly within the Commission's authority to impose under Section 9-220(h-4) as amended." (*See* Staff Statement of Position at 3.)

Even if the Commission had such authority, the Commission should be confident that sufficient protections already exist under the terms of the Act and the IPA-approved final draft sourcing agreement. The Act sets forth a comprehensive list of requirements and obligations to be imposed upon CCE. Although the Act requires that the SNG brownfield facility guarantee

$100 million in savings to consumers, the Act does not require that CCE find a third-party guarantor for that guarantee, instead imposing the obligation upon CCE itself. (*See* 220 ILCS 5/9-220(h-2)(6).) The Commission also should be aware that as part of the legislative process, the General Assembly was focused upon including provisions to support the savings guarantee. The Act requires that CCE create a Consumer Protection Reserve Account in part to back this guarantee, and that the developer deposit $150 million of developer-at-risk funds in that account, as well as 50% of all ancillary revenues over the 30-year term of the Sourcing Agreement (valued at $1.5 billion). (*See* 220 ILCS 5/9-220(h-2), (h-2)(1).) Indeed, following the Governor's veto of SB 3388 (96th General Assembly), the legislation was revised to increase the developer's initial deposit into that account from $100 million to $150 million. (*Compare* 200 ILCS 5/9-220(h-2) *with* SB 3388 (96th General Assembly) (Enrolled), 9-220(h-2).) Thus, as reflected in the Resolutions, the General Assembly was keenly aware of the mechanics of the obligation that it imposed, and exercised its legislative judgment in establishing the statutory framework that is in place. (*See* SR 585, HR 755.)

In order to get around its acknowledgment that the Commission lacks authority to modify the IPA-approved final draft sourcing agreement, Staff made what appeared to be an equitable argument that "it is of sufficient importance that the Staff is compelled to bring it to the Commission's attention regardless of the Commission's ultimate determination in that regard." (*See* Staff Statement of Position at 3.) However, neither Staff nor any other party cited any authority the Commission has to impose "equitable" relief to adjust the IPA-approved final draft sourcing agreement. Indeed, that notion is squarely precluded by Illinois law, which provides that an agency (unlike a court of equity) is a creature of statute and may not unilaterally extend its authority beyond that conferred by statute. (*See Sheffler v. Commonwealth Edison Co.*, 399

Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd* 955 N.E.2d 1110 (Ill. 2011); *see also Harrison Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 523, 797 N.E.2d 183, 189 (5th Dist. 2003), *aff'd* 212 Ill. 2d 237, 817 N.E.2d 479 (2004).) The Commission's lack of such implied authority was highlighted in the Resolutions: "The Illinois Appellate and Supreme Courts have consistently held that, because administrative agencies are creatures of statute, they possess only those powers expressly delegated by law, and they may not act beyond their statutorily delegated authority . . .." (SR 585; HR 755.) The Commission should not and cannot come in after the fact and alter the final draft Sourcing Agreement based on the "equitable" suggestions of Staff.

Moreover, Staff failed to include in its unverified comments filed earlier in this proceeding any reference to the Summary Appraisal Report for Indiana Coal Gasification Plant, which CCE provided to Staff in response to data requests in the instant proceeding. This appraisal estimates the terminal value of a virtually identical SNG facility at $4.5 billion and clearly validates the value of the guaranty provided by CCE. This appraisal was accepted by the Indiana Utility Regulatory Commission as validation that a guaranty by the facility was sufficient to meet its requirements. (*See Joint Petition by the Indiana Finance Authority, et al.*, Cause No. 43976, 2011 WL 5999317, at *89-93 (Indiana Utility Regulatory Commission Nov. 22, 2011 Order).)

The IPA-approved final draft sourcing agreement further augments the guaranteed savings, requiring that CCE pledge the facility itself as collateral for this guarantee. As was explained in CCE's Brief on Exceptions, the Indiana Utility Regulatory Commission evaluated the anticipated residual value of a substantially similar facility, and found it to be at least $4.5 billion. (*See* CCE Brief on Exceptions at 41.) Attached to CCE's Application for

Rehearing as Attachment E, and incorporated herein by reference, is a further analysis of the likely residual value of the CCE facility performed by experts at the Brattle Group, which concludes that the value actually is likely to be much higher.

The Brattle Group analysis demonstrates how the CCE facility could be adapted favorably to alternate future energy price scenarios in order to fulfill the obligation for consumer savings. CCE has looked at the economics of 48 different scenarios published by the Federal Energy Information Administration ("EIA") and numerous permutations within each of those (totaling 468 cases studied). The findings of the Brattle Group in earlier analysis regarding rate of return, showed that for a small fraction of these 468 market projections studied, certain combinations of sustained low natural gas prices and high fuel prices so impaired CCE's economics that the facility would be unable to meet the consumer savings guarantee. The premises of many of the hypothetical outlier EIA scenarios are fanciful assumptions about future market conditions inconsistent with reason or history. Further, in each instance, for the vast majority of their natural gas purchases, consumers will be saving billions of dollars per year off of any reasonable projection of future prices, dwarfing any "shortfall" in savings under the Sourcing Agreement. But in the interest of completeness, all scenarios were studied, and it was the existence of the "problematic" outlier scenarios which formed the basis for the Staff suggestion of a further corporate guarantor. However, the Brattle Group's earlier analysis of consumer savings was fundamentally incomplete (and rightfully so, since the purpose of the report was to analyze rate of return, not the savings guarantee), and did not account for CCE's ability to adapt to energy trends, which would evolve over the 30-year contract term.

In Attachment E to CCE's Application for Rehearing, The Brattle Group remedies the previous incomplete treatment of these "problematic" scenarios. The first response by CCE

would be to change the fuel blend from a 50/50 blend of coal and petroleum coke ("petcoke") to 65% petroleum coke and 35% coal. Since petcoke is forecast to be priced significantly lower than Illinois Basin coal, this has the effect of reducing the SNG price. This blend of fuels is permitted under the Illinois Power Agency Act, if needed to realize consumer savings. (*See* 20 ILCS 3855/1-10.)

The next response by CCE to these hypothetical scenarios follows from the observation that the low natural gas price scenarios uniformly show a widening spread of price divergence from petroleum products (that is, crude oil prices escalate while gas prices remain flat). The obvious response then for CCE would be to convert the facility at the end of the contract term to produce energy products that are indexed to crude oil rather than natural gas. Due to the flexibility of gasification technology, the shifting of the output from SNG to gasoline could be accomplished with relatively modest additional capital. The Brattle Group then analyzes the economics of the facility in the remaining outlier scenarios and concludes that the conversion to gasoline output would serve to add approximately $700 million to the value of the facility. This means that in a hypothetical scenario where the parties forced the sale of the CCE facility after the contract term in order to make consumers whole, the CCE facility would have significantly increased its ability to cover a shortfall. With further analysis, The Brattle Group then concludes that with a logical market adaptation by CCE, there were only nine (9) remaining of the 468 (*i.e.,* 2%) of cases studied where the $100 million consumer savings guarantee would not be met. Under these circumstances, the Staff's suggested justification for imposing a requirement for a corporate guarantor is highly diminished, such that it would be far from reasonable to modify the IPA-approved final draft sourcing agreement to add this requirement, particularly since the Commission lacks the statutory authority to do so.

In any event, requiring a third-party guarantor would render the project unfinanceable, further demonstrating that inclusion of such a term is inappropriate. (*See* CCE Brief on Exceptions, Attachment B (Maley Affidavit) at ¶ 12.) As Mr. Maley's Affidavit explains, requiring Leucadia National Corporation to provide a corporate guarantee of the sort suggested by the January 10 Order is unprecedented. (*See id.*) Over the past decade, Leucadia has made investments of more than $5 billion and never been required to provide any open-ended guaranty of the sort suggested by the Order. (*See id.*)

Thus, even assuming that the Commission acted within its authority (which CCE does not concede), CCE has presented substantial evidence that the guarantor is not necessary, especially given that imposing such a requirement would prevent the project from being financed. (*See, e.g.*, CCE Brief on Exceptions at 41-42.) Accordingly, CCE respectfully requests that the Order on Rehearing remove the requirement that the clean coal SNG brownfield facility identify a third-party guarantor for the consumer savings.

2. Actual Capital Structure Reporting Requirement

The January 10 Order improperly concluded that the only way to ensure compliance with the statutory requirement to determine the "actual cost of debt" is to require the capital structure (*i.e.* the debt/equity split) and the interest rate for the project debt to be input into Schedule 5.2A at financial close. (*See* January 10 Order at 20.) Although it is moot for the purposes of recovery of costs from the participating utilities' ratepayers -- the rate of return is fixed and does not vary with capital structure -- for a number of reasons, the structure of these sourcing agreements does not permit an exact quantification. Attempts to quantify the capital structure in advance threaten the financeability of the project.

Among the reasons that the capital structure cannot be exactly quantified in advance is that the total capital recoverable through capital charges may or not match with the actual EPC (engineering, procurement, and construction) costs to build the facility, leading to a higher or lower percentage of equity depending on whether CCE develops and operates the clean coal SNG brownfield facility under or over budget. That is, although the capital costs are pre-approved at this time for purposes of determining the formula rate for the facility, the actual amount of equity necessary to construct the facility will not be known until the time that construction is complete.

While it is enticing to require "actual capital structure" information, such an approach would be inconsistent with capital cost recovery under the Act, which requires that the return on equity be fixed on a per-MMBtu basis at the time of this Commission proceeding, thus requiring CCE to issue more or less equity relative to a fixed amount of debt depending on whether actual costs are higher or lower than anticipated. (*See* 220 ILCS 5/9-220(h-3)(1)(B) (requiring capital recovery on fixed "per unit" basis).)

Another consideration is that all of the analyses to date and return on equity calculations presented by CCE and the other parties (including Staff) have assumed or incorporated a 70/30 debt/equity capital structure. The 4.44% base rate of return approved by the Commission in the December 7 Interim Order -- and, significantly, the analysis supporting the 4.44% base rate of return -- is inextricably linked to the 70/30 capital structure. The return on equity expected by CCE and acceptable to the other parties and the Commission could easily be different for, for instance, a 60/40 or for an 80/20 split of debt and equity. Specifically, in the case of higher equity contribution relative to debt (such as 60% debt /40% equity), the all-in projected return on equity would be lower, and CCE's associated proposed return on equity would likely be for a

higher base return to compensate. For a higher debt contribution (such as 80/20 and higher), CCE's debt service coverage ratios -- a key factor for the capital markets to evaluate -- would progressively decrease, and the cost of debt would require adjustment.

Moreover, as CCE has explained, the structure of CCE's proposed Schedule 5.2A provides a disincentive for CCE to deviate from this capital structure in the actual financing: If the debt percentage were to be lower than 70% (thus increasing the equity percentage), CCE's base return on equity would decrease, since CCE has no means to increase the equity return beyond the fixed $.93/MMBtu. (*See* CCE Application for Rehearing at 25.)

Similarly, if the debt percentage were to be higher than 70%, CCE would have no mechanism to recover the extra cost of debt based on the higher principal, since the maximum debt principal is set as well (only the final interest rate is used to determine the cost of debt). Therefore, the Schedule 5.2A proposed by CCE, while not guaranteed to match precisely with the ultimate actual capital structure, would punish CCE if CCE were to deviate from its terms.

For the foregoing reasons, the proper conclusion is that the other aspects of the Sourcing Agreement currently enforce a 70/30 debt/equity indicative capital structure, and for consistency it should be fixed in the schedule as well. To that end, Schedule 5.2A in the Sourcing Agreement attached hereto as Attachment A reflects what CCE considers the most likely capital structure that will be used to finance the project. CCE respectfully requests that the Commission enter an Order on Rehearing that removes the capital structure reporting requirement and approves a Sourcing Agreement substantially in the form of Attachment A hereto.

3. Carbon Sequestration Requirement

The January 10 Order improperly endorsed a request of the Attorney General's Office ("AG") that the final draft sourcing agreement be modified to include a reference to the clean

coal SNG brownfield facility's duties under Section 9-220(h-5) of the Act (220 ILCS 5/9-220(h-5)). (*See* January 10 Order at 33.) While Chicago Clean Energy acknowledges that it does have duties under Section 9-220(h-5), the Commission does not have the authority to modify the IPA-approved final draft sourcing agreement as requested by the AG. The Commission has no authority to add in new terms to the final draft sourcing agreement in the instant proceeding, no matter how useful or worthy the Commission deems the new terms, if the new terms do not fit within Section 9-220(h-4). Respectfully, Chicago Clean Energy requests that the Commission adopt the alternative approach advanced by the AG, and simply acknowledge in the Order on Rehearing that the AG will have an opportunity to advance its preferred language in a future proceeding.

The AG recommended that the Commission add language into the IPA-approved final draft sourcing agreement that would refer to the clean coal SNG brownfield facility's duties under Section (h-5) of the Act (220 ILCS 5/9-220(h-5)). (*See* AG Statement of Position at 1-3.) CCE has explained that the AG's request is premature, because although the Commission lacks authority to add terms to the IPA-approved final draft sourcing agreement, the Commission has a future duty to approve the clean coal SNG brownfield facility's Carbon Capture and Sequestration Plan, which will be attached as an appendix to the Sourcing Agreement. (*See* CCE Brief on Exceptions at 48. *See also* IPA-Approved Final Draft Sourcing Agreement at Schedule 5.2D (currently labeled "To be attached after ICC approval of the Carbon Capture and Sequestration Plan").) To the extent that the AG's concerns are not addressed by the statutory remedies in Section 9-220(h-5)(B), the AG will have the ability to advocate for inclusion of its preferred language as part of the Carbon Capture and Sequestration Plan. (*See* 220 ILCS 5/9-220(h-7)(2).) The Act requires that an additional proceeding be opened to approve a Carbon

Capture and Sequestration Plan. (*See* 220 ILCS 5/9-220(h-7)(1) ("No clean coal facility or clean coal SNG brownfield facility may transport or sequester carbon dioxide unless the Commission approves the method of carbon dioxide transportation or sequestration").) Thus, as a practical reality, the clean coal SNG brownfield facility is forced to get approval of the Carbon Capture and Sequestration Plan before any operations-related greenhouse gases are generated for potential sequestration, or risk potential violations and fines under Section 9-220(h-5) and (h-7). Therefore, the AG can get the relief it requests in the Carbon Capture and Sequestration Plan proceeding, and can do so without an Order that is beyond the Commission's authority in this proceeding.

The January 10 Order's third party guarantee requirement, capital structure reporting requirement, and carbon sequestration requirement are not contemplated by the Act and, therefore, each was imposed without statutory authority. Furthermore, each requirement is substantively unjustified given the information in the record. The third party guarantee requirement and capital structure requirement should be removed. To the extent necessary, the AG's concern regarding the carbon sequestration requirement can be addressed through a recognition that a proceeding regarding sequestration will occur. Accordingly, CCE requests that the Order on Rehearing appropriately remove these additional unauthorized obligations.

C. The Commission Should Remove The Unauthorized Early Termination Provisions

Under the revisions to Section 9-220(h-4) of the Act pursuant to Public Act 97-0630, the Commission was directed to remove <u>all</u> early termination provisions except those specifically enumerated by the Act. (*See* 220 ILCS 5/9-220(h-4); CCE Brief on Exceptions at 42-44.) Despite the straight-forward language in the Act, the January 10 Order failed to clearly remove either one of the two termination provisions from the IPA-approved final draft sourcing

agreement. (*See* CCE Brief on Exceptions at 42-44; January 10 Order at 32.) To the extent there was any ambiguity regarding the Commission directive from the General Assembly, that ambiguity was eliminated in the Resolutions which state that the Commission was to "remove 2 statutorily unauthorized early termination provisions from the final draft sourcing agreement . . .." (SR 585; HR 755.) That is, the Commission has a statutory obligation to remove both Section 1.2(h) and Section 14.20 of the final draft sourcing agreement.

1. Section 1.2(h) Should Be Removed

Section 1.2(h) explicitly would allow the utilities to terminate the sourcing agreement if the utilities were not allowed to fully recover their costs associated with the sourcing agreement. While it appears that the January 10 Order meant to direct the removal of Section 1.2(h), it is less than clear in this regard.

The Act is perfectly clear in Section 9-220(h-4) that the final draft sourcing agreement must be modified to remove all termination provisions except for those related to a specific subset of circumstances:

> The Commission shall … modify the contract only as necessary to provide that the gas utility does not have the right to terminate the sourcing agreement due to any future events that may occur other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment

Section 1.2(h) of the IPA-approved final draft sourcing agreement allows for termination of the agreement based upon "administrative, judicial, or other governmental action" that changes the cost recovery or prudence protection for the utilities. (*See* IPA-approved final draft sourcing agreement at 2.) Since these "change-in-law" events described in 1.2(h) do not match the excluded list of termination reasons, 1.2(h) must be removed.

Therefore, CCE respectfully requests that the Commission enter an Order on Rehearing approving a Sourcing Agreement consistent with Attachment A hereto that removes Section 1.2(h).

2. Section 14.20 Should Be Removed

In Public Act 97-0630, the General Assembly expressed a clear and unmistakable intent for all termination provisions aside from a few enumerated reasons to be stricken from the IPA's final draft sourcing agreement. (*See* 220 ILCS 5/9-220(h-4).) Nevertheless, the January 10 Order refused to remove Section 14.20, a non-severability provision, from the IPA-approved final draft souring agreement. As a result, the participating utilities are left with an ability to terminate the contract for reasons "other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment." (*Id.*) In short, retaining Section 14.20 in the contract would violate the Act.

Section 14.20 is a non-severability provision that effectively would grant parties an avenue to terminate the agreement if one or more of the contractual provisions were invalidated, including Section 2.11 which provides that utilities are allowed to fully recover their costs associated with the Sourcing Agreement. (*See* CCE Brief on Exceptions at 42-43.) The January 10 Order arrives at the conclusion that Section 14.20 is not addressed by (h-4), but that conclusion is contrary to the plain language of Section 14.20. (*See* January Order at 32.) Section 14.20 reads, in whole:

> All of the provisions of this Agreement constitute a material integral part of the Parties' agreements and this Agreement shall be construed in whole and not in part so that **if individual provisions, agreements or covenants are determined to be invalid, void or unenforceable by any court having jurisdiction, then such determination shall invalidate, void, and make unenforceable this Agreement in its entirety**.

(IPA-approved Final Draft Sourcing Agreement, Section 14.20 (emphasis added).) If this provision is retained, then a court invalidating any provision of the Sourcing Agreement or declaring a single provision void or unenforceable apparently would enable the utilities to terminate the Sourcing Agreement. Thus, contrary to the plain meaning of Section 9-220(h-4) of the Act, the utilities would have the right to terminate for a reason other than the statutorily enumerated reasons: a failure to meet milestones, uncured default, extended force majeure, or abandonment.

The January 10 Order also suggests that it also considered Nicor's argument that Section 14.20 "is reasonable." (*See* January 10 Order at 32.) To the extent that the Order relied on that argument, it is contrary to the judgment of the General Assembly. Section 9-220(h-4) of the Act does not provide the Commission with the authority to evaluate the reasonableness of termination provisions. Instead, Section (h-4) directs the Commission to remove all termination provisions except for those enumerated in Section (h-4). Thus, the "reasonableness" of Section 14.20 is immaterial and irrelevant to the Commission's inquiry. (*See* SR 585; HR 755 ("The Illinois Appellate and Supreme Courts have consistently held that public policy in Illinois is expressed by the General Assembly, and it is not the province of an administrative agency to inquire into the wisdom and propriety of the legislature's act or to substitute its own judgment for that of the legislature . . .").)

As the Commission is aware, Nicor is currently challenging several provisions of the IPA-approved final draft sourcing agreement in Circuit Court, pursuant to the Illinois Administrative Review Law. Section 14.20 arguably would allow one or both of the participating utilities to terminate the Sourcing Agreement if Nicor is successful in removing any of the sections of the final draft sourcing agreement through its ongoing litigation in the Circuit

Court or in any subsequent litigation. This risk will be unacceptable to lenders. (*See* CCE Brief on Exceptions, Attachment B (Maley Affidavit) at ¶ 11.) There must be certainty of risk associated with the sourcing agreements that can be controlled and managed by CCE; Section 9-220(h-4) recognizes this and directs the Commission to modify the IPA-approved final draft sourcing agreement to appropriately limit the termination triggers to circumstances that are under CCE's control. (*See id.* at ¶ 7.) At the time PA 97-0630 passed the General Assembly on November 29, 2011, Nicor had already filed its Administrative Complaint in Circuit Court; the General Assembly could have - but chose not to - add non-severability to the enumerated allowable reasons for early termination. (*See* Bill Status for HB 691, http://ilga.gov/legislation/billstatus.asp?DocNum=691&GAID=11&GA=97&DocTypeID=HB&LegID=56476&SessionID=84 (accessed April 4, 2012).) Retention of Section 14.20 directly undercuts the certainty that is key to financeability and is contrary to the plain meaning of the Act. To the extent that the Commission concludes that the Act is unclear, the Commission can and should look to the Resolutions, which explicitly indicate that both early termination provisions should be removed. (*See* SR 585; HR 755 ("we express serious concerns that the Illinois Commerce Commission Order entered on January 10 . . . fails to delete one of the 2 provisions for early termination that were contained in the final draft sourcing agreements submitted to the Commission by the Illinois Power Agency . . .")

CCE respectfully requests that the Commission remove Section 14.20 from the IPA-approved final draft sourcing agreement. In the alternative, if the Commission believes that retaining this provision is consistent with the terms of Section 9-220(h-4) of the Act, CCE respectfully requests that the Commission include language in its Final Order on Rehearing

indicating that the utilities cannot terminate the Sourcing Agreement due to a court invalidating any provision of the Sourcing Agreement or declaring any provision void or unenforceable.

CCE respectfully submits that keeping either Section 1.2(h) or Section 14.20 in the Sourcing Agreement would be plainly contrary to the Act and unreasonable. Retaining either provision would allow for an avenue to terminate the contract that is not contemplated by the Act – in other words, those Sections must be removed under the clear terms of the Act. Therefore, CCE respectfully requests that the Commission enter an Order on Rehearing approving a Sourcing Agreement consistent with Attachment A hereto that removes both Section 1.2(h) and Section 14.20.

D. The Commission Should Correct The Typographical And Scrivener's Errors

The January 10 Order misapplied the applicable legal standard, and as a result failed to correct numerous typographical and scrivener's errors that CCE identified, and that Staff agreed should be corrected. In its December 14, 2011 filing, CCE identified a number of scrivener's errors and typographical errors. In response to the scrivener's and typographical errors identified by CCE and the other parties, the January 10 Order suggests that the Commission adopt a mechanical review:

> While the above-quoted section of Public Act 97-0630 requires the Commission to correct scrivener's errors, it is a corollary of that correction that there must be agreement that an error occurred in the drafting of the document. . . . The Commission adopts changes as scrivener's errors only in those instances where there is agreement among the parties that an actual scrivener's error occurred.

(January 10 Order at 22.) As a result, the Order improperly rejected many corrections to scrivener's and typographical errors presented by CCE.

As identified in CCE's Verified Reply Comments, under Illinois law, scrivener's errors (also defined as "clerical errors") are errors where the intent of parties to a contract or document is not reflected in the final writing. (*See, e.g.*, *Gray v. Nat'l Restoration Sys., Inc.*, 354 Ill. App. 3d 345, 371, 820 N.E.2d 943, 965-66 (1st Dist. 2004) (Campbell, P.J. concurring in part, dissenting in part) (collecting and summarizing rule from Illinois precedent).) To wit, "Several Illinois cases have confronted the issue of a scrivener's error. In each instance, the correction was mechanical or technical in nature, not decisional or judgmental." (*Id.* at 965; *see also Schaffner v. 514 West Grant Pl. Condominium Ass'n Inc. III*, 756 N.E.2d 854 (1st Dist. 2001) (similar summary of Illinois law); *Dauderman v. Dauderman*, 130 Ill. App. 2d 807, 809, 263 N.E.2d 708, 710 (5th Dist. 1970) (inserting omitted phrase to harmonize particular term with the rest of the divorce decree).)

In other words, scrivener's errors represent an instance where the parties had arrived at a mutual understanding, but the writing does not reflect that assent. A scrivener's error is distinguished from the situation where the parties reach a mutual understand and make a judgment call about how to execute that understanding and the agreed-to execution fails to carry out the parties' vision. (*See Gray,* 354 Ill. App. 3d at 371; *Schaffner*,756 N.E.2d at 854.) A scrivener's error does not depend on the *ex post* agreement that an error was made, but rather whether the parties had a meeting of the minds that was not transferred to paper by the scrivener.

An additional consideration presents itself here that is not present in the overwhelming majority of modern cases: the IPA played the simultaneous role of arbiter of contract terms and scrivener of terms of agreement. (*See* 220 ILCS 5/9-220(h-1).) Unlike most cases, where one party or the other drafted the contract, the IPA was responsible for setting terms where consensus could not be achieved and memorializing consensus terms. (*See id.*)

With these considerations in mind, CCE presents the scrivener's and typographical errors that the January 10 Order incorrectly rejected. For the Commission's convenience, CCE has attached hereto and made a part hereof the CCE Corrected Agreement as Attachment A, and a chart that identifies each of the typographical and scrivener's errors that should be reconsidered and corrected in the Order on Rehearing as Attachment B. Certain of the typographical and scrivener's errors require further elaboration on the mutual understanding of the parties and the description of the error, as follows below.

1. Clarification Of "Applicable MCQ" vs. "MCQ"

a. Mutual Understanding of the Parties

The parties understood that the term "Applicable MCQ" was meant to be used to reflect situations when the utilities' purchase obligation may be equal to the MCQ or the Increased MCQ. The IPA's final draft sourcing agreement fails to reflect this understanding.

b. Description of the Error

The term "Monthly Contract Quantity" or "MCQ" is used throughout the sourcing agreement to describe the combined amount of substitute natural gas ("SNG") the participating utilities must purchase in a given month, and is a calculated value based upon known inputs. Section 2.1(a) describes how the MCQ may be increased to a higher value, known as the "Increased MCQ" under certain circumstances. Therefore in any given month, the utilities' purchase obligation may be equal to the MCQ or the Increased MCQ -- the maximum value in effect in a particular month is defined as the "Applicable MCQ." Likewise, under the IPA's final draft sourcing agreement, certain sections within the body of the sourcing agreement dealing with the purchase obligation improperly reference the MCQ, rather than the Applicable MCQ; these references would not be accurate if the Increased MCQ were in effect. Specifically, changing certain uses of "MCQ" to "Applicable MCQ" as requested by CCE will serve to clarify:

- Buyer needs to pay for Conforming SNG delivered to title transfer point up to the Applicable MCQ (*see* CCE Corrected Agreement at 4, Subsection 2.1(b));
- Seller may nominate SNG up to the Applicable MCQ (*see* CCE Corrected Agreement at 5, Subsection 2.2(b));
- Seller may not sell SNG to any other party until Applicable MCQ is satisfied in a given month (*see* CCE Corrected Agreement at 5, Subsection 2.2(c));
- SNG in excess of Applicable MCQ is Incremental Production (*see* CCE Corrected Agreement at 6, Subsection 2.2(e)); and
- Buyer is to pay Seller for Conforming SNG up to the Applicable MCQ in a given month (*see* CCE Corrected Agreement at 21, Subsection 5.1).
- The Monthly Delivered Quantity ("MDQ") is not to exceed the Applicable MCQ in a given month. (*See* CCE Corrected Agreement, Definitions section at 11.)

Significantly, Staff supported CCE's corrections to include the references to "Applicable MCQ." (*See* Staff Statement of Position, Exhibit D at 1-2.) Nonetheless, the IPA asserted that it

"objects" to each of the corrections involving the use of the term "Applicable MCQ" in CCE's Corrected Sourcing Agreement. (*See* IPA Statement of Position, Exhibit 2 at 2-4.) In each instance, the reason given was the same:

> The IPA selected Ameren's proposed terms for Section 2.1(b), which did not include the word "Applicable". The proposed change is thus a substantive alteration to the Form SNG Agreement circulated by the IPA.

(IPA Statement of Position at 2-4.)

Unfortunately, it appears that the January 10 Order failed to correct this scrivener's error based solely upon the IPA's failure to endorse this revision. (*See* January 10 Order at 32.) However, respectfully, the IPA's purported rationale for opposing the correction to this scrivener's error is flawed at several levels.

- **First, the author of the scrivener's error is irrelevant.** Attributing the authorship of the sections in question to Ameren does nothing to negate the likelihood that this is a scrivener's error; Ameren may have intentionally or unintentionally inserted language into the sourcing agreement. Notably, Ameren did not object to CCE's proposed correction.

- **Second, the IPA failed to evaluate the substance of the error.** Rather than try to determine whether the proposed revision would give the sourcing agreement the intended meaning, the IPA improperly focused solely upon the mechanics of the IPA's own drafting. As noted above, in determining whether a scrivener's error exists, the Commission must determine whether it appears that the section at issue properly yields the result intended by the parties. (*See, e.g., Dauderman*, 130 Ill. App. 2d at 809.) Here, neither the IPA nor the Order has evaluated the impact of this error, which results in a number of unintended consequences.

- **Finally, the IPA failed to accurately incorporate the language it claims to have accepted in the final draft sourcing agreement.** In Ameren's final draft proposed sourcing agreement delivered to the IPA on October 6, 2011, Ameren incorporated every single one of the uses of "Applicable MCQ" that CCE included in the CCE

Corrected Agreement. IPA asserted in its Statement of Position that it had accepted Ameren's version of these sections (*see* IPA Exhibit 2 at 1), but the IPA did not properly transcribe the word "Applicable" to modify MCQ -- this a classic example of a scrivener's error.

The correction to Applicable MCQ is a necessary correction of scrivener's errors required to reflect the actual agreement of the parties and the decision of the IPA as well as to ensure self-consistency within the draft sourcing agreement itself. Staff supported this correction. (*See* Staff December 16, 2011 Statement of Position, Exhibit D at 1-2.)

2. Clarification That "Title Transfer Point" Is Distinct From "Receiving Pipeline"

a. Mutual Understanding of the Parties

The Receiving Pipeline is separate and distinct from the Title Transfer Point, each of which are to be mutually agreed upon by the parties.

b. Description of the Error

In the IPA's final draft sourcing agreement, Sections 4.2 and 4.8 incorrectly suggest that the Receiving Pipeline and Title Transfer Point are synonymous. Throughout the remainder of the document, it is clear that the Receiving Pipeline is separate and distinct from the Title Transfer Point. For example, the definition of "Receiving Pipeline" makes clear that this term refers to the set of pipeline facilities, mutually agreed to by Buyer and Seller, which is used for "transportation and ultimately for delivery" of SNG to Buyer at the Title Transfer Point. (*See* CCE Corrected Agreement, Definitions section at 15.) Likewise, the IPA Memo clearly indicated that these are separate concepts. (*See* IPA Memo at 7 ("The IPA adopted terms in the agreement that requires the parties to negotiation [sic] in good faith, and to mutually agree at a later date on both the receiving pipeline and the title transfer point. Recognizing that the SNG brownfield facility will not even begin construction for almost four years, the IPA deemed it

reasonable and equitable to let the parties agree at a later date on the appropriate receiving pipeline and title transfer point.")

However, the wording of Section 4.2 in the IPA's final draft sourcing agreement obfuscates this distinction, stating "if the SNG is not accepted by the Receiving Pipeline at the Title Transfer Point." As reflected in the CCE Corrected Sourcing Agreement, the addition of the phrase "or is not delivered to" in Section 4.2 will serve to ensure that the definitions of Receiving Pipeline and Title Transfer Point are consistent throughout the sourcing agreement. (*See* CCE Corrected Agreement at 14.)

The IPA asserted that there is no scrivener's error in Section 4.2, stating, "No party proposed the insertion of the word 'Conforming' to Section 4.2, and the addition will alter the meaning of Section 4.2… In addition, adding the language 'or is not delivered to' changes the meaning of Section 4.2. Both changes are substantive alterations to the contract." (*See* IPA Statement of Position, Exhibit 2 at 1-2.) Nicor likewise asserted that with CCE's addition of the word "Conforming" to Section 4.2, the gas utilities would be "obligated for gas tendered by CCE that the interstate pipeline will not take." Section 4.2 specifies that only "Conforming SNG" can trigger a "delivery" and thus a payment obligation, and "Conforming SNG" is defined as "SNG accepted by the Receiving Pipeline for further transportation on the Receiving Pipeline's pipeline system." Nevertheless, CCE would be willing to agree that the addition of the word "Conforming" in Section 4.2 is not necessary, and CCE's Further Corrected Agreement does not contain this revision.

Regarding the IPA's objection to including the language "or is not delivered to" in Section 4.2, CCE agrees that the inserted language modifies the meaning of Section 4.2, but that

modification simply removes the contradiction with the definition of Receiving Pipeline, and is thus a needed and appropriate correction to a scrivener's error.

Section 4.8 also requires a minor correction for clarity. The first clause in Section 4.8 of the IPA's final draft sourcing agreement specifies that the Parties are to mutually agree upon the delivery point for Conforming SNG known as the "Title Transfer Point". The second clause goes on to say that the delivery point "shall be at the point of interconnection between…" This is a logical inconsistency where on one hand, the Title Transfer Point is selected through a negotiation, and on the other hand it is specifically defined in the sourcing agreement. The discussion of "Title Transfer Point" in the IPA Memo makes it clear that the IPA intended for the parties to mutually agree upon the delivery point. (*See* IPA Memo at 7.) Staff supported the correction to Section 4.2. (*See* Statement of Position, Exhibit D at 1-2.)

As reflected in the CCE Corrected Agreement, the insertion of the word "designated," in Section 4.8 removes the logical inconsistency and clarifies that the parties are to agree upon the delivery point. (*See* CCE Corrected Agreement at 18.)

Neither Staff nor any of the parties disagreed with this correction to Section 4.8.

3. Correction Regarding Acceptance vs. Delivery Of SNG

a. Mutual Understanding of the Parties

The Buyer's acceptance of the Conforming SNG is automatic once Conforming SNG is delivered to the Title Transfer Point.

b. Description of the Error

Section 5.1 of the IPA's final draft sourcing agreement needs to be revised to ensure consistency with other parts of the sourcing agreement regarding the utilities purchase obligation.

Some of the other sections of the sourcing agreement which address this obligation are as follows:

- Section 2.1(a): "Buyer shall purchase and take the Buyer's Allocated Percentage of the Conforming SNG tendered at the Title Transfer Point by Seller on a monthly basis, up to the Buyer's Allocated Percentage of the Applicable MCQ...." (Emphasis added.)

- Section 2.1(a) "Notwithstanding anything to the contrary in the foregoing, in each month Buyer shall be obligated to take and pay for the Buyer's Allocated Percentage of the Conforming SNG tendered by Seller at the Title Transfer Point for Buyer…" (Emphasis added.)

- Section 2.1(b): "Buyer shall pay for the Buyer's Allocated Percentage of the Conforming SNG tendered by Seller to the Title Transfer Point up to the Buyer's Allocated Percentage of the Applicable MCQ in any contract month..." (Emphasis added.)

- Section 2.1(d): "Buyer shall accept and assume title to Conforming SNG that is delivered to Buyer at the Title Transfer Point and sold to Buyer in accordance with Section 2.1(a) (Purchase Obligation)." (Emphasis added.)

There is no ambiguity in any of these provisions preceding Section 5.1 that the Buyer's acceptance of the Conforming SNG is automatic once Conforming SNG is "delivered" or "tendered" to the Title Transfer Point. However, the current language in Section 5.1 contains a scrivener's error in that it could be improperly misconstrued to imply a voluntary act of "acceptance" on the part of the Buyer. In order to remain consistent with Sections 2.1(a), 2.1(b), and 2.1(d), Section 5.1's language should be clarified as shown in the CCE Corrected Agreement to read: "…Conforming SNG delivered to the Title Transfer Point…"

Nicor asserted that there is confusion regarding a circumstance where Conforming SNG is tendered but not accepted. (*See* Nicor Gas Statement of Position, Exhibit C at 2.) However, the sourcing agreement is clear that the utility shall accept all such conforming gas tendered to the title transfer point.

The IPA likewise objected to this correction to Section 5.1. (*See* IPA Statement of Position, Exhibit 2 at 3.) The IPA stated only that "The insertion of the words 'delivered to' change [sic] the substantive meaning of 5.1, and are thus a substantive alteration to the Form SNG Agreement circulated by the IPA." (*Id.*) CCE disagrees that the change to correct the scrivener's error is substantive; the utility's acceptance obligation is clear based on repeated provisions (including as noted in Sections 2.1(a), 2.1(b), and 2.1(d)) indicating that the utility "shall" take and pay for the Conforming SNG. The modification to Section 5.1 is necessary to remove the possibility of a contradiction with those sections of the draft sourcing agreement.

ICC Staff took no position the replacement of "accepted at" with "delivered to." (*See* Statement of Position at 1-2.) ICC Staff in its December 16, 2011 filing suggested the insertion of "Applicable" rather than "delivered to" or "accepted at" in this section. CCE disagrees that "Applicable" is a useful correction to this section, as the term is not used elsewhere in the sourcing agreement in this context and the agreement is clear in other sections that the purchase obligation is to be based upon Conforming SNG delivered to the Title Transfer Point.

4. Correction Regarding The Reference Year Used To Calculate O&M Escalation

a. Mutual Understanding of the Parties

The base O&M cost calculation is to be done in 2011 dollars.

b. Description of the Error

The IPA's final draft sourcing agreement suggests that the calculation of the base O&M costs is done in "2010 dollars". (*See* CCE Corrected Agreement at 14.) However, the base O&M cost estimates submitted to the Commission by both CCE and the CDB were in 2011 dollars. (*See* Staff Motion to Take Administrative Notice, Att. 1(a) at 1, 1(b) at 4.) As a result, the O&M cost approved by the Commission in the December 7 Interim Order to be included in

the sourcing agreement was in 2011 dollars. (*See* December 7 Interim Order at 11.) As reflected in the CCE Corrected Agreement, to avoid double-counting inflation, the reference in the sourcing agreement should be to 2011 dollars. (*See* CCE Corrected Agreement at 14.)

Neither Staff nor any of the parties disagreed with this correction.

5. Clarification Of The Fuel Component Calculation

a. Mutual Understanding of the Parties

CCE is entitled to pass through its actual cost of fuel.

b. Description of the Error

The calculation of the fuel component of the price both in the body of the IPA's final draft sourcing agreement and in Schedule 5.2C need to be revised to reflect that CCE is to recover its actual cost of fuel.

It is undisputed that CCE is to pass through its actual cost of fuel. This is recognized in the Act, in the sourcing agreement itself, and in the IPA Memo. (*See* 220 ILCS 5/9-220(h-1)(8), CCE Corrected Agreement at 22, Subsection 5.2(C), IPA Memo at 14.)

As acknowledged in the IPA Memo, the mechanism to calculate and incorporate the actual cost of fuel on a monthly basis is set forth in Schedule 5.2C. (*See* IPA Memo at 6.) However, the IPA's final draft sourcing agreement failed to reference Schedule 5.2C in the body of the agreement. As reflected in the CCE Corrected Agreement, adding the reference to Schedule 5.2(C) at page 28 corrects this omission.

As with all other costs, the means by which CCE recovers the fuel costs is on a per-MMBtu basis for Conforming SNG produced and delivered to the Title Transfer Point. Because the energy efficiency of the Project is not 100%, the number of MMBtus of SNG output will be lower than the number of MMBtus of fuel input. The calculation in Item # 4 in Schedule 5.2C of

the IPA's final draft sourcing agreement has a scrivener's error which would calculate the fuel costs based upon MMBtus of fuel input, resulting in an under-recovery of fuel costs.

As written in the IPA's final draft sourcing agreement, Item # 4 calls for dividing the total cost of all fuels by the total MMBtus of fuels consumed; this will derive the average price for all fuel inputs to the clean coal SNG brownfield facility on a per-MMBtu basis. That is, under the terms of the IPA's final draft sourcing agreement, CCE would under-recover fuel costs with the formula as written, proportional to the actual efficiency of the Project.

As reflected in the CCE Corrected Agreement, the actual fuel costs on a per-MMBtu basis for SNG output can be properly calculated by changing the divisor in Item # 4 of Schedule 5.2C to be the number of MMBtus of Conforming SNG produced, rather than the fuel consumed. (*See* CCE Corrected Agreement at Schedule 5.2C.)

Staff agreed with CCE's position that the fuel component is improperly calculated in Schedule 5.2C as a result of scrivener's errors. (*See* Staff Statement of Position at 9-10.) However, Staff goes on to argue that CCE's suggested corrections are also incorrect, claiming that the formula will result in 100% of the fuel costs being recovered by 84% of the projected annual output. (*See* Staff Statement of Position at 10-12.)

Respectfully, Staff is incorrect. It appears that Staff has misinterpreted of the volume of "Conforming SNG." In the IPA's final draft sourcing agreement, Conforming SNG is defined as "SNG accepted by the Receiving Pipeline for further transportation on the Receiving Pipeline's pipeline system." (*See* IPA's Final Draft Sourcing Agreement Schedule I at 4 (Definitions).) The critical distinction here is that Conforming SNG is the sum total of both the volumes contracted by the utilities (84% of projected annual output) ***plus*** Incremental Production, which is defined as "production of Conforming SNG on any Day in excess of the Maximum DCQ on

any Gas Day, in any month in excess of the Applicable MCQ for such month, or in excess of the ACQ in any Contract Year." (*See id.* at 8-9.) This means that using the volume of Conforming SNG as the denominator in the calculation for Schedule 5.2C in the CCE Corrected Agreement is appropriate, since it will properly represent 100% of the SNG produced.

Thus, when the total price of all fuel inputs is used as the numerator as reflected in the CCE Corrected Agreement, the resulting number will be the average fuel price across the volume of all Conforming SNG produced: both contract volumes and incremental production. Further, the fuel cost recovered in Section 5.2C of the sourcing agreement will properly be proportionate to the amount of fuel used to produce contract SNG volumes, exclusive of Incremental Production volumes (which cost is recovered via the calculation of Net Incremental Revenues). Therefore, no revisions are needed to the Schedule 5.2C contained in CCE's Corrected Sourcing Agreement.

No other party disagreed with the modification suggested by CCE.

6. Clarification Of Notice To Proceed References

a. Mutual Understanding of the Parties

The term "Notice to Proceed" is a defined term.

b. Description of the Error

The sourcing agreement has a definition of "Notice to Proceed," which describes the instance when CCE provides its Engineering, Procurement, and Construction (EPC) firm(s) with the full release on the scope of services to construct the Project. (*See* CCE Corrected Agreement, Definitions section at 12.) This definition is used at numerous times in the sourcing agreement, most significantly as a Seller Milestone in Section 3.4. (*See* CCE Corrected Agreement at 20.) However, in two places in the IPA's final draft sourcing agreement -- in Section 6.1(b) and in Section 12.7(a) -- there is a reference to "a notice to proceed to construction," without capital

letters. (*See* CCE Corrected Agreement at 27, 40.) This term is synonymous with the definition of "Notice to Proceed" and should be replaced with the defined term to avoid any ambiguity.

The IPA contends that it accepted Ameren's language for Section 6 .1(b) and 12.7(a) with regards to the phrasing of notice to proceed. (*See* IPA Comments Exhibit 2 at 2.) For the reasons stated above, Ameren's language accepted by the IPA in the final draft sourcing agreement contained a scrivener's error, and should be corrected as per the CCE Corrected Sourcing Agreement.

Staff took no position regarding this correction and no other party commented.

7. Correction To Remove Reference To A Nonexistent Exhibit 1

1. Mutual Understanding of the Parties

There is no Exhibit 1 to the IPA's final draft sourcing agreement.

2. Description of the Error

Section 14.1(b) of the IPA's final draft sourcing agreement contains a reference to Exhibit 1, which is indicated to be a form of consent to assignment of the agreement. This Exhibit was not included with the sourcing agreement. Accordingly, the suggested correction in the CCE Corrected Sourcing Agreement restates the consent to assignment without referencing Exhibit 1. (*See* CCE Corrected Sourcing Agreement at 43.) There are no parties in disagreement that the last sentence of the paragraph needs to be restated to accommodate this missing reference.

Nicor asserted that CCE's revisions do not correct errors, stating: "CCE's change is inappropriate because it deprives the utilities of the right to advance their positions concerning the form and substance of a reasonable non-disturbance agreement." (Nicor Gas Statement of

Position, Exhibit C at 2.) The IPA took the position the phrase "and Buyer" should be included in both the first and last sentence of the paragraph. (*See* IPA Comments, Exhibit 3 at 2.)

However, the final draft sourcing agreement transmitted by the IPA had the phrase "and Buyer" struck out, indicating that it was intended to be deleted. It is only a scrivener's error that the "clean" version of the final draft sourcing agreement showed the phrase at all. The CCE Corrected Sourcing Agreement accepts the IPA's deletion of the phrase "and Buyer" in the first sentence of Section 14.1(b), and modifies the last sentence of the same paragraph to remain consistent with the first sentence.

Commission Staff took almost the same position as the IPA but recommends maintaining the reference to Exhibit 1 as an alternative. (*See* Staff Statement of Position at 29.) In addition to the reiterating the prior objections with the insertion of "and Buyer" as inconsistent with the terms that were shown in the IPA's final draft sourcing agreement, CCE contends that a continuing reference to a nonexistent Exhibit 1 in the final draft sourcing agreement is confusing. Further, there is no mechanism in the Act that would authorize the Commission to create and incorporate such an exhibit.

8. Clarification Of Definition Of "Title Transfer Point"

a. Mutual Understanding of the Parties

In the definitions, when referring back to specific sections of the final draft sourcing agreement where the term is defined, the phrase "has the meaning specified in" should be used.

b. Description of the Error

Throughout the Definitions section of the IPA's final draft sourcing agreement, whenever there is a reference to a Section of the agreement for the definition, the final draft sourcing agreement uses the phrase "has the meaning specified in" to refer back to the relevant Section. This correction conforms the "Title Transfer Point" definition, using the same language to refer

back to the process in Section 4.8 for mutually agreeing upon a Title Transfer Point. (*See* CCE Corrected Sourcing Agreement, Definition section at 16.) Staff supports this correction. (*See* Statement of Position at 1-2.) There are no parties in disagreement on this correction.

9. Clarification Of Definition Of "Transportation and Marketing Component"

a. Mutual Understanding of the Parties

In the definitions, when referring back to specific sections of the final draft sourcing agreement where the term is defined, the phrase "has the meaning specified in" should be used.

b. Description of the Error

The correction to the definition of "Transportation and Marketing Component" conforms the language used to refer back to the process in Section 5.2 for determining the Transportation and Marketing Component. (*See* CCE Corrected Sourcing Agreement, Definition section at 16.) Staff supports this correction. (*See* Statement of Position at 1-2.) There are no parties in disagreement on this correction.

10. Deletion Of Schedule Entitled "Annex A: Monthly Contract Quantity"

a. Mutual Understanding of the Parties

Annex A to the IPA's final draft sourcing agreement should be deleted.

b. Description of the Error

The schedule entitled "Annex A: Monthly Contract Quantity" contained in the IPA's final draft sourcing agreement following Schedule 14.1(b) is extraneous. It is not referenced in the sourcing agreement, and its original function was subsumed by the current Schedule 2.1A. Therefore, as shown in the CCE Corrected Agreement, this schedule should be deleted. (See CCE Corrected Sourcing Agreement at Schedule 2.1A.) Staff supports this correction. (*See* Statement of Position at 1-2.) There are no parties in disagreement on this correction.

III.
CONCLUSION

This is a unique proceeding before the Commission, involving unusual issues and a compressed case schedule. However, the Commission's January 10 Order improperly undercuts the financeability of the clean coal SNG brownfield facility. That result is directly contrary to repeated legislative and executive actions to foster the development of that facility. Because of this, and because, respectfully, the January 10 Order reached incorrect results on several critical questions, Chicago Clean Energy urges the Commission to modify the Order in a means that is consistent with the letter and intent of the law, and that will allow the project to advance.

WHEREFORE, Chicago Clean Energy respectfully requests that the Commission:

1. Enter an Order on Rehearing consistent with the arguments contained herein and in CCE's Application for Rehearing
2. Approve a Sourcing Agreement consistent with the CCE Corrected Agreement attached hereto as Attachment A; and
3. Grant such additional or different relief as required by the interests of justice.

Respectfully submitted,

CHICAGO CLEAN ENERGY, LLC

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